Office-Supreme Court, U.S.
FILED
APR 6 1981
ALEXANDER L. STEVAS,
CLERK

80-1679
No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

ANTHONY M. SCOTTO, *Petitioner*

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

EDWARD BENNETT WILLIAMS
HAROLD UNGAR
RICHARD M. COOPER
WILLIAMS & CONNOLLY
839 17th Street, N.W.
Washington, D.C. 20006
(202) 331-5000

Counsel for Petitioner
Anthony M. Scotto

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

QUESTIONS PRESENTED

1. In a prosecution under "RICO,"* 18 U.S.C. 1962 (c) and (d), for conducting and conspiring to conduct the affairs of a union (the "enterprise") through a "pattern of racketeering activity," predicated upon multiple misdemeanors under 29 U.S.C. 186(b), each of which consists of the receipt of money from an employer paid without "intent to influence [the accused] in respect to any of his actions, decisions or duties" as a union official:

(a) whether, on the element of the nexus between the predicate acts and the control of the affairs of the enterprise, the trial court could lawfully reject a requested jury instruction making conviction turn upon proof of a functional, operational role played by the predicate acts in the conduct of union affairs;

(b) whether, although the RICO statute contains no *mens rea* requirement, the trial court could lawfully reject a requested jury instruction making conviction turn on intent to operate the union unlawfully, especially since the predicate Taft-Hartley misdemeanors, unlike any of the other predicate offenses set forth in the statute (18 U.S.C. 1961(1)), are themselves not *mens rea* crimes.

2. Whether, in addition to his conviction and sentence for a RICO violation, the defendant may be convicted and cumulatively sentenced for the offenses upon which the RICO violation is predicated.**

---

* An acronym for "Racketeer Influenced and Corrupt Organizations," Title IX of the Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922 (1970).

** *Note pursuant to Rule 21(b):* In the court below, Anthony Anastasio was a co-appellant with petitioner Anthony M. Scotto.

TABLE OF CONTENTS

	Page
Opinion Below	1
Jurisdiction	1
Statutes Involved	2
Statement	2
The RICO Convictions	4
The Dual Conviction Issue	9
Reasons For Granting The Petition	10
Conclusion	24
Appendix A	1a
Appendix B	19a
Appendix C	21a

PRECEDING PAGE WAS BLANK

TABLE OF AUTHORITIES

CASES: PAGE

Blockburger v. *United States,* 284 U.S. 299 (1932) . 10, 21, 22

Dennis v. *United States*, 341 U.S. 494 (1951) 19

Holdridge v. *United States,* 282 F.2d 302 (8th Cir. 1960) 19, 21

Ingram v. *United States,* 360 U.S. 672 (1959) 4

Ladner v. *United States,* 358 U.S. 169 (1958) 24

Morissette v. *United States,* 342 U.S. 246 (1952) 19

Pereira v. *United States*, 347 U.S. 1 (1954) 4

Sansone v. *United States,* 380 U.S. 343 (1965) 9

United States v. *Altese,* 542 F.2d 104 (2d Cir. 1976), *cert. denied,* 429 U.S. 1039 (1977) 11

United States v. *Anderson,* 626 F.2d 1358 (8th Cir. 1980), *cert. denied,* 49 U.S.L.W. 3617 (Feb. 23, 1981) 14, 15

United States v. *Boylan,* 620 F.2d 359 (2d Cir.), *cert. denied*, 101 S. Ct. 103 (1980) 4, 8, 10, 18

United States v. *Dennis,* 458 F. Supp. 197 (E.D. Mo. 1978) 13

United States v. *DePalma,* 461 F. Supp. 778 (S.D.N.Y. 1978) 5-6

United States v. *Dotterweich,* 320 U.S. 277 (1943) 20

United States v. *Elliott,* 571 F.2d 880 (5th Cir.), *cert. denied,* 439 U.S. 953 (1978) 6, 11, 12, 14

United States v. *Freed,* 401 U.S. 601 (1971) 20

United States v. *Gibson,* 486 F. Supp. 1230 (S.D. Ohio 1980) 16, 17

United States v. *Guiliano,* No. 80-1291 (2d Cir. March 10, 1981) 3-4, 13

United States v. *Heller,* 579 F.2d 990 (6th Cir. 1978) 20

United States v. *Huber,* 603 F.2d 387 (1979), *cert. denied,* 445 U.S. 927 (1980 17-18

Table of Authorities Continued

CASES: PAGE

United States v. *Mandel,* 415 F. Supp. 997 (D. Md. 1976) 23

United States v. *Moeller,* 402 F. Supp. 49 (D. Conn. 1975) 11

United States v. *Nerone,* 563 F.2d 836 (1977), *cert. denied,* 435 U.S. 951 (1978) 16, 17

United States v. *Ricciardi,* 357 F.2d 91 (2d Cir.), *cert. denied,* 384 U.S. 942 (1966) 7, 8

United States v. *Rone,* 598 F.2d 564 (9th Cir. 1979), *cert. denied,* 445 U.S. 946 (1980) 10, 11, 22

United States v. *Rosenthal,* 454 F.2d 1252 (2d Cir.), *cert. denied,* 406 U.S. 931 (1972) 9-10

United States v. *Ryan,* 350 U.S. 299 (1956) 8

United States v. *Ryan,* 232 F.2d 481 (2d Cir. 1956)..... 7

United States v. *Stofsky,* 409 F. Supp. 609 (S.D.N.Y. 1973), *aff'd,* 527 F.2d 237 (2d Cir. 1975), *cert. denied,* 429 U.S. 819 (1976) 5

United States v. *Turkette,* 632 F.2d 896 (1st Cir. 1980), *cert. granted,* 101 S. Ct. 938 (1981) 11, 14, 15

United States v. *Umans,* 368 F.2d 725 (2d Cir. 1966), *cert. dismissed,* 389 U.S. 80 (1967) 9

United States v. *United States Gypsum Co.,* 438 U.S. 422 (1978) 19, 20, 21

United States v. *Webster,* No. 79-5204, (4th Cir. Jan. 15, 1981, *pet. for reh. filed,* Feb. 2, 1981)..... 15, 16, 17

United States v. *Weisman,* 624 F.2d 1118, *cert. denied,* 101 S. Ct. 209 (1980) 5, 6

United States v. *Winston,* 558 F.2d 105 (2d Cir. 1977)... 9

Whalen v. *United States,* 445 U.S. 684 (1980) 10, 22

Table of Authorities Continued

STATUTES AND RULES:	PAGE
Organized Crime Control Act of 1970, Title IX, §904(a), Pub. L. No. 91-452, 84 Stat. 922 (1970)	i, 22, 23
Organized Crime Control Act, Title X, 18 U.S.C. §§3575-78 (1976)	13-14, 14
18 U.S.C. §1961(1) (1976)	i, 2, 11
18 U.S.C. 1962 (c) (d) (1976)	*passim*
18 U.S.C. §1964 (1976)	23
18 U.S.C. §1964 (c) (1976)	13
26 U.S.C. §7201 (1976)	1,2
26 U.S.C. §7206 (1) (1976)	1, 2
28 U.S.C. 1254 (1)	2
28 U.S.C. 2106 (1976)	3
29 U.S.C. 186 (a)-(d) (1976)	i, 1, 2, 3, 4, 7, 8, 9, 10, 18, 21
29 U.S.C. §501 (c) (1976)	17
Fed. R. App. P. 41	1
Fed. R. Crim. P. 8	12
U.S. Sup. Ct. Rule 21(b)	i

MISCELLANEOUS:	
Atkinson, *Racketeer Influenced And Corrupt Organizations, 18 U.S.C. §§1961-68: Broadest Of The Federal Criminal Statutes,* 69 J. of Crim. Law & Criminology 1 (1978)	10
I Blakely, *Materials On RICO: Criminal Overview,* Cornell Institute On Organized Crime 25 (1980)	12
G. Robert Blakey & B. Gettings, *RICO: Evening Up The Odds,* Trial (Oct. 1980) 58	11
115 Cong. Rec., 575-607, 819-56, 952-72, 35191-217, 35287-364, 36280-93, 36294-96 (Jan. 21-23, Oct. 6-7, 12, 1970)	20

Table of Authorities Continued

MISCELLANEOUS: PAGE

H.R. Rep. No. 91-1549, 91st Cong., 1st Sess. (1970) 20

T. Marro & E. Shannon, *Are Prosecutors Wild Over RICO?,* Legal Times of Washington, Oct. 8, 1972, p. 32 10

McLellan, *The Organized Crime Act (S. 30) Or Its Critics: Which Threatens Liberties?,* 46 Notre Dame Lawyer 55 (1979) 14

National Law Journel, March 30, 1981, p. 8 13

New York Times, Jan 23, 1980, p.1 20

S. Rep. No. 91-617, 91st Cong., 1st Sess., 158 (1969) .. 20, 23

United States Attorneys' Manual, §9-110.101 (Jan. 17, 1977) 12, 17

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. _____

ANTHONY M. SCOTTO, *Petitioner*

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Anthony M. Scotto, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, affirming his conviction in the United States District Court for the Southern District of New York on charges of violating 18 U.S.C. 1962(c) and (d), 29 U.S.C. 186(b), and 26 U.S.C. 7201 and 7206(1).

OPINION BELOW

The opinion of the court of appeals (App. A, *infra,* 1a-18a) is not yet officially reported.

JURISDICTION

The court of appeals filed its opinion and entered judgment against petitioner on September 2, 1980. A

timely petition for rehearing and suggestion for rehearing *en banc* was denied, without opinion, on March 6, 1981. A copy of that order of denial is printed at App. B, *infra,* 19a. By its order of March 27, 1981, the court of appeals stayed issuance of its mandate, under Fed. R. App. P. 41, pending application to this Court for a writ of certiorari. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

The relevant provisions of RICO, 18 U.S.C. 1961 *et seq.* and of the Taft-Hartley Act, 29 U.S.C. 186, are set forth in App. C, *infra,* 21a-27a.

STATEMENT

Petitioner was convicted of twenty-seven Taft-Hartley misdemeanors, 29 U.S.C. 186(b), for receiving money from employers while he was an officer of the International Longshoremen's Association and one of its locals; a substantive RICO violation, 18 U.S.C. 1962(c), for conducting the affairs of the union through those[1] Taft-Hartley violations; a RICO conspiracy, 18 U.S.C. 1962(d); two violations of 26 U.S.C. 7201 for evading income tax on the money received from employers; and two violations of 26 U.S.C. 7206(1) for falsifying his tax returns as to those payments.[2]

---

[1] RICO requires only two predicate offenses. The prosecution, if it has evidence of multiple offenses, may elect to predicate the RICO charge on two of them and charge all the others separately. Here, since no such election was made, the trial court instructed the jury that the RICO charge was based on "any two or more of the acts alleged in Counts 2 through 37" and an equivalent instruction was given on the RICO conspiracy count. Appendix below (hereinafter "App."), 76, 85.

[2] On nine other Taft-Hartley counts and two other tax counts, the jury failed to reach a verdict.

Petitioner was sentenced on the two RICO counts to five years of imprisonment, five years of supervised probation, and a fine of $25,000.00. On the twenty-seven Taft-Hartley counts, he was sentenced to five cumulative one-year terms, concurrent with the RICO term, and additional fines of $50,000.00. On the tax counts, as well, he received a concurrent five-year term, but no fine. App. 126-27.

In the appeal below, petitioner argued: (1) that the RICO convictions were erroneous; (2) that it was error to convict him *both* of RICO and of the predicate misdemeanors upon which the RICO violations were based; and (3) that both the misdemeanor convictions and the tax convictions flowing from them should be reversed for improper jury instructions.

In this petition, considering the nature of *certiorari* and having regard for the function of this Court, petitioner raises only those issues relating to the RICO convictions and their effect upon the predicate misdemeanor convictions. Petitioner will pray, however, that the Court, if it grants the petition and ultimately sustains petitioner's position, follow the course recently adopted by the court below[3] and vacate and remand for a new trial even those convictions not here specifically attacked.

---

[3] In *United States* v. *Guiliano,* No. 80-1291 (2d Cir. March 10, 1981), the court, having reversed convictions on a RICO count and on one of the two predicate counts, but not on the remaining predicate count, nevertheless, pursuant to the judicial authority conferred by 28 U.S.C. 2106, remanded for a new trial on the remaining count. In explanation of its action, the court said: "One of the hazards of a RICO count is that when the Government is unable to sustain a conviction under this statute, it will have to face the claim that the prejudicial effect of tarring a defendant with the label of 'racketeer' tainted the conviction on an otherwise valid count." *Slip op.* at 1768-69. While this principle is not one of universal

THE RICO CONVICTIONS

RICO, 18 U.S.C. 1962(c), prohibits conducting the affairs of an enterprise through a pattern of racketeering activity — *i.e.*, through two or more violations of a list of specified criminal statutes. Those two or more violations are the predicate for the RICO violation. Petitioner's defense to the RICO counts[4] consisted not only of a denial that he had committed the predicate Taft-Hartley offenses, but of the further denial that the employer payments, even if they were Taft-Hartley violations, played or were intended to play any role whatsoever in his conduct of the affairs of the union, the designated "enterprise" in the RICO charges. He contended, therefore, that the payments could not constitute a RICO predicate.

Highly relevant to this defense was the government's representation, in a letter to the trial judge at the start of the trial, that the employer payments in this case, unlike those in *United States* v. *Boylan,* No. 79 Cr. 225 (E.D.N.Y.),[5] were not charged to have been made "with

---

applicability, *id.* at 1769, we think it uniquely applicable in this case where at least some of the evidence admitted against petitioner was admissible solely because of the inclusion of the RICO conspiracy count.

[4] This section of the petition, dealing, for the most part, with the substantive RICO conviction, also applies to the RICO conspiracy conviction. If the conduct of which petitioner has been found guilty has not properly been found to have played a role in his conduct of union affairs, or to have been intended to play such a role, there is not only no substantive RICO offense, but also no conspiracy to commit such an offense. *Pereira* v. *United States,* 347 U.S. 1, 11-12 (1954); *Ingram* v. *United States,* 360 U.S. 672, 678 (1959).

[5] Conviction affirmed, *United States* v. *Boylan,* 620 F.2d 359 (2d Cir.), *cert. denied,* 101 S. Ct. 103 (1980). *Boylan* involved §186(a)(4) of Taft-Hartley, which includes the element of "intent to influence." The instant case involves §186(a)(1) and (2), which include no such element.

intent to influence [the recipient] in respect to any of his actions" as a union officer. App. 49-50. Since the gist of the RICO charge is that "the predicate acts constituting a 'pattern of racketeering activity' must all be done in the conduct of the affairs of an 'enterprise'," *United States* v. *Weisman,* 624 F.2d 1118, 1122 (2d Cir.), *cert. denied,* 101 S. Ct. 209 (1980), it was crucial to petitioner's defense that the jury be adequately instructed on the nature and extent of the required pattern-enterprise nexus.

Petitioner requested an instruction that: (1) *objectively,* there must be an operational, functional nexus between the predicate acts and his participation in the conduct of the affairs of the union (App. 46); and (2) *subjectively,* he must have had a "specific intent to do something the law forbids . . . with bad purpose either to disobey or disregard the law." App. 45. In colloquy with the trial court on the instructions, petitioner's counsel made unmistakably clear the defense position that, to be convicted under RICO, "you have to intend to conduct the enterprise directly or indirectly in an illegal manner." Tr. 6895. Equally unmistakable was the court's rejection of the defense position:

> "I don't agree with you. If that's what you are suggesting I don't think you have to show that the enterprise was being conducted in an illegal manner." *Id.*[6]

---

[6] In taking that position the court accepted the prosecution's contention that *United States* v. *Stofsky,* 409 F. Supp. 609 (S.D.N.Y. 1973), *aff'd,* 527 F.2d 237 (2d Cir. 1975), *cert. denied,* 429 U.S. 819 (1976), had made "pattern" the gist of RICO, virtually eliminating the significance of nexus with the enterprise. Tr. 6892, 6900-01.

The *Stofsky* dicta, 409 F. Supp. at 613, 617, relied on by the government, had been rejected by another judge of the same court in *United States* v. *DePalma,* 461 F. Supp. 778, 782-84 (S.D.N.Y.

Instead, the trial court charged the jury, in the statutory language, that:

> ". . . the Government must prove . . . that through the two or more of these connected racketeering offenses the defendant Scotto conducted or participated directly or indirectly in the conduct of the affairs of that enterprise." App. 76-77.

The court then added:

> ". . . you must find beyond a reasonable doubt that the defendant committed the two or more of the offenses alleged in Counts 2 through 37 while and as part of conducting or participating either directly or indirectly in the conduct of the affairs of the enterprise.
>
> "In this regard it is not necessary for the Government to prove that the affairs of the enterprise were advanced by the defendant's activities, although you may find this to be true, or that the particular enterprise was corrupt or that the enterprise authorized the defendant to commit the particular acts of racketeering activity alleged.
>
> "It is only necessary to find that the acts were commited by the defendant or caused to be committed by him in the conduct of, or his participation in, the affairs of the enterprise." App. 78-79.

As to the subjective element of the RICO offense, the court refused to instruct the jury that conviction turned on specific intent to conduct the affairs of the union in an illegal manner, instructing instead:

> "Fifth, that the defendant acted wilfully and knowingly. You must be satisfied beyond a

---

1978), and by the Fifth Circuit in *United States* v. *Elliott*, 571 F.2d 880, 899 n.23, *cert. denied*, 439 U.S. 953 (1978); and subsequently the Second Circuit itself rejected them in *United States* v. *Weisman*, *supra*, 624 F.2d at 1121-23.

reasonable doubt that the defendant knew what he was doing and that he did it deliberately and voluntarily and not because of a mistake, accident, negligence or some other innocent reason.

"An act is wilful for the purposes of this statute if it is done knowingly and deliberately with a criminal motive or purpose.

"In determining whether the defendant has acted knowingly and willfully it is not necessary that the defendant knew he was violating any particular act or law. It is sufficient if you are convinced beyond a reasonable doubt that the defendant was aware of the general unlawful nature of his act as alleged in the indictment." App. 79.

The court below, while declaring that "predicate acts . . . unrelated to the enterprise or one's position in it would be insufficient," held that the necessary relationship exists not only when the predicate offenses are used in conducting the affairs of the enterprise (as petitioner had argued), but also "when . . . one is enabled to commit the predicate offenses solely by virtue of his position in the enterprise or involvement in or control over the affairs of the enterprise. . . ." App. A, *infra,* 10a.

Since, by definition, a §186(b) violation can be committed only by a union official, this new explication of the nexus requirement fits petitioner like a glove, but it also eliminates the crucial nexus element from RICO even while professing to preserve it. A union official violates §186(b) if he receives from an employer a gift, "however trifling and innocuous," *United States* v. *Ryan,* 232 F.2d 481, 483 (2d Cir. 1956), and even if made out of personal friendship and not because he is a union official, *United States* v. *Ricciardi,* 357 F.2d 91, 99 (2d Cir.), *cert. denied,* 384 U.S. 942 (1966). Here,

petitioner was found to have committed multiple §186(b) violations by receiving payments not alleged to have been intended to influence his conduct of union affairs, but, since he was "enabled to commit the predicate offenses solely by virtue of his position in the enterprise," the court below makes him, *ipso facto,* a violator of RICO and denies his entitlement to an instruction under which the jury would determine whether his misdemeanors did, in fact, play any operational role in his conduct of union affairs. The court below has thus held that petitioner's *status* as a union official, which is sufficient to satisfy §186, a misdemeanor statute, also suffices to satisfy the "conduct of the affairs" element of RICO, a major felony statute.[7]

The court below sustained the intent instruction that was given, and the refusal to give a *mens rea* instruction, on the purported authority of its earlier opinion in *United States* v. *Boylan,* 620 F.2d at 361-62. App. A, *infra,* 12a. The court ignored the fact that *Boylan* involved predicate offenses with *mens rea* (offenses in the nature of bribery), and did not present the *mens rea* issue here presented.[8]

---

[7] The court below also approved the language of the instructions as sufficiently conveying to the jury the defense theory that RICO guilt depended on the defendant having conducted the union's affairs by illegal acts. In short, the court read the instructions as fairly conveying to the jury a message that the trial judge had held *not* to be required and had specifically *refused* to convey.

[8] The §186 offense here involved is a non-*mens rea* misdemeanor. *United States* v. *Ryan,* 350 U.S. 299, 305 (1956); *United States* v. *Ricciardi,* 357 F.2d 91 (2d Cir.), *cert. denied,* 384 U.S. 942 (1966). Although the word "willfully" appears in the penalty provision, §186(d), the offense is *malum prohibitum,* and requires neither an evil motive nor knowledge that acceptance of the prohibited payment is unlawful. *Ricciardi, supra,* 357 F.2d at 99-100.

Although §186 is included as a predicate offense of RICO, the legislative history contains no discussion as to whether Congress intended that the Draconian penalties of RICO (imprisonment up to twenty years, a fine up to $25,000.00, and sweeping forfeitures) be imposed on a person who merely commits two §186 violations of the non-*mens rea, malum prohibitum* type. In his argument below, petitioner contended that Congress did not intend such a result, that its purposes could be achieved without it, and that RICO should therefore be interpreted, in such a case, as incorporating an intent requirement similar to that articulated in *United States* v. *Winston,* 558 F.2d 105, 109 (2d Cir. 1977).

The decision below on the *mens rea* issue is stark: even for a twenty-year felony, and in the absence of any expression of congressional intent to dispense with *mens rea,* no *mens rea* is required; and anything in the trial court's instructions that hinted at a *mens rea* requirement was unduly favorable to the defendant. App. A, *infra,* 14a.

THE DUAL CONVICTION ISSUE

Although the imprisonment imposed for the Taft-Hartley violations was concurrent with the five-year RICO term, petitioner was subjected to *additional* fines of $50,000.00 for those Taft-Hartley violations. Petitioner argued below that the RICO conviction covered every element of the predicate Taft-Hartley offenses, so that the latter were lesser-included-offenses within the former. *Sansone* v. *United States,* 380 U.S. 343, 349-50 (1965). Petitioner requested, therefore, that the Taft-Hartley convictions be vacated. *United States* v. *Umans,* 368 F.2d 725, 730-31 (2d Cir. 1966), *cert. dismissed,* 389 U.S. 80 (1967); *United States* v. *Rosenthal,* 454 F.2d 1252, 1255-56 & n.2 (2d Cir.), *cert. denied,* 406 U.S. 931

(1972). The court below rejected this argument on the authority of its opinion in *United States* v. *Boylan, supra,* which, in turn, cited this Court's opinion in *Whalen* v. *United States,* 445 U.S. 684 (1980). App. A, *infra,* 14a.[9]

REASONS FOR GRANTING THE PETITION

1. RICO has been characterized as "the most sweeping criminal statute ever passed by Congress," with "great potential for abuse against individual defendants." Atkinson, *Racketeer Influenced And Corrupt Organizations, 18 U.S.C. §§1961-68: Broadest Of The Federal Criminal Statutes,* 69 J. of Crim. Law & Criminology 1, 6 (1978).[10]

---

[9] In *Boylan,* the court held that RICO and §186 violations are "separate crimes, separately punishable," because they "do not proscribe the same act or transaction, and they implement different congressional purposes." 620 F.2d at 361. For the same reason, the court held that there was no violation of the double jeopardy test set out in *Blockburger* v. *United States,* 284 U.S. 299, 304 (1932): "whether each provision requires proof of a fact which the other does not." Purporting to follow what this Court had written in *Whalen,* the court below found it "clear that in the case before [it], Congress intended to create separate crimes, separately punishable." *Boylan,* 620 F.2d at 361. As to what made that intent clear, the court only referred to the dictum from *United States* v. *Rone,* 598 F.2d 564, 571 (9th Cir. 1979), *cert. denied,* 445, U.S. 946 (1980), that "[t]here is nothing in the RICO statutory scheme which would suggest that Congress intended to preclude separate convictions or consecutive sentences for a RICO offense and the underlying or predicate crimes. . . ."

[10] Allegations have been made, for example, that prosecutors are attempting to exact guilty pleas by threatening to prosecute under RICO and that judges in cases brought under RICO commonly speak, in their jury instructions, about the purpose of Congress to stop racketeering. T. Marro & E. Shannon, *Are Prosecutors Wild Over Rico?,* Legal Times of Washington, Oct. 8, 1979, p. 32.

The statute deals generally with the interplay of "racketeering activity" and "enterprise." The provision here involved, §1962(c), covers participating "in the conduct of [the] enterprise's affairs through a pattern of racketeering activity." "Racketeering activity" includes eight separate types of state crime and twenty-four federal crimes. 18 U.S.C. 1961(1). In a majority of the circuits, the racketeering activity itself may constitute the "enterprise."[11] What "is quite simply . . . arson punishable by state law" can even now, at the whim of a federal prosecutor, be transmuted into a twenty-year, $25,000-fine, forfeiture-laden violation of RICO. See *United States* v. *Moeller,* 402 F. Supp. 49, 60 (D. Conn. 1975).[12]

Two of the reputed co-authors of RICO and proselytizers for its greater use tout the statute as having replaced conspiracy as what Judge Learned Hand called "the darling of the prosecutor's nursery."[13] As one of them points out:

> "There are few offenses involving white collar offenders, that is crimes of fraud and deceit, that are not in fact mail fraud [one of the predicate offenses for RICO]. There are few mail frauds that aren't in

---

[11] See, *e.g., United States* v. *Altese,* 542 F.2d 104 (2d Cir. 1976), *cert. denied,* 429 U.S. 1039 (1977); but see, *United States* v. *Turkette,* 632 F.2d 896 (1st Cir. 1980), *cert. granted,* 101 S. Ct. 938 (1981).

[12] Moreover, if more than one culprit is involved, the prosecutor, if he wishes, may add to the RICO charge a charge of RICO conspiracy, see, *e.g., United States* v. *Elliott, supra* note 6, and the trial judge may impose consecutive maximum sentences. 571 F.2d at 895-96; see also *United States* v. *Rone, supra,* 598 F.2d at 570-71.

[13] G. Robert Blakey & B. Gettings, *RICO: Evening Up The Odds,* Trial, (Oct. 1980) 58.

> fact, if it is [sic] a sophisticated scheme at all, also a RICO violation."[14]

He also says, perhaps having in mind the instant case:

> "By reconceptualizing, if you will, the way in which the Taft-Hartley violation goes down, and that's a payment from an employer to a [union] representative, you can alter it from a simple misdemeanor under the Taft-Hartley Act to a very serious felony under RICO."[15]

So broad, moreover, is RICO's sweep that only this Court can prevent it from erasing legal principles painstakingly distilled out of experience over the generations for the proper functioning of federal criminal justice. In one circuit, for example, RICO has already been proclaimed as a "legislative innovation in the realm of individual liability for group crime," the effect of which "is to free the government from the strictures of the multiple conspiracy doctrine and to allow the joint trial of many persons accused of diversified crimes." *United States* v. *Elliott, supra,* 571 F.2d at 900, 903.[16]

Nor can the courts, if concerned over excesses of RICO, safely rely on prosecutors' discretion. Prosecutors are not always judicious; sometimes, in a desire to achieve a result they deem just, they close their eyes to the proper limitations of the law.[17]

---

[14] 1 Blakey, *Materials on RICO: Criminal Overview,* Cornell Institute On Organized Crime 25 (1980).

[15] *Id.*

[16] The *Elliott* view would also erase the joinder principles embodied in Fed. R. Crim. P. 8.

[17] Nor does a system of pre-indictment scrutiny by the Department of Justice provide any real security against improper prosecution. For example, notwithstanding a provision for screening by the Organized Crime and Racketeering Section of the Department, *United States Attorneys' Manual* §9-110.101 (Jan. 17, 1977), it became necessary for a trial court, on its own motion, summarily to dismiss a RICO prosecution of a common loan-shark because the prosecutor had named as the "enterprise" the General Motors

An additional cause for concern is that not only prosecutors hold the reins of RICO. Under 18 U.S.C. §1964(c), a civil suit may be brought by "[a]ny person injured in his business or property by reason of a violation of section 1962." Such private litigation, made attractive by a provision for treble damages, costs and attorneys' fees, must be expected to become increasingly fashionable.[18]

The decision below promises greatly to extend the already overbroad reach of RICO by reading the "conduct of the affairs" element out of the statute, and by dispensing with *any* requirement of *mens rea* for this twenty-year felony.

2. The philosophic justification of RICO's severe sanctions, reflected on virtually every page of the legislative history, is that the types of crimes committed by the members of the undefined group called "organized crime," as costly and dangerous to society as those crimes may ordinarily be, grow enormously more costly and dangerous when the perpetrators emerge from their underworld habitat and use their resources, their power and their methods to acquire and operate the economic institutions by which society lives.

Any mere penalty-enhancement purpose Congress may have had for the punishment of repeated misconduct was amply served by Title X of the Organized

---

Assembly Division where the accused was employed. *United States* v. *Dennis,* 458 F. Supp. 197 (E.D. Mo. 1978). See also, *United States* v. *Guiliano, supra* note 3 at 1766, where the court, in reversing a RICO conviction, took "occasion to express some concern about the Government's attempt to apply the RICO statute to the activities of [the accused]." One may well inquire, with Juvenal, "*Quis custodiet ipsos custodes*?"

[18] See the report headlined "Novel RICO Civil Suit Seeks $500M Damages," National Law Journal, March 30, 1981, p. 8. The RICO proselytizers have been actively urging such litigation. *Supra* note 13 at 60, note 14 at 25, and note 10 at 30.

Crime Control Act, 18 U.S.C. 3575-78.[19] But, as summarized by Senator John L. McLellan, the manager of RICO in the Senate, "[u]nless an individual . . . uses that pattern [of racketeering activity] to obtain or operate an interest in an interstate business, he is not made subject to proceedings under Title IX."[20]

What the statute addresses is the *aggregation* of criminal power and established institutions. The decision below, by effectively obliterating the essential "conduct of the affairs of the enterprise" element, distorts and misapplies RICO.

3. In the RICO case already accepted for review, *United States* v. *Turkette,* No. 80-808, *cert. granted,* 101 S. Ct. 938 (1981), the issue the Solicitor General presents is whether RICO applies to "illegitimate enterprises." Such application of RICO has been criticized as essentially eliminating the "enterprise" element from the statute.[21] The Solicitor General, however, maintains in his brief in *Turkette,* at pp. 23-26, that the "enterprise" element of the statute is fully preserved even when RICO is applied to criminal enterprises. It would seem then that, whichever side prevails in *Turkette,* the Court is likely to leave intact the proposition that: "The gravamen of the offense . . . is the conduct of an enterprise's affairs through a pattern of racketeering activity." *United States* v. *Elliot, supra,* 571 F.2d at 899 n.23.

---

[19] *United States* v. *Anderson,* 626 F.2d 1358, 1368 n.17 (8th Cir. 1980), *cert. denied,* 49 U.S.L.W. 3617 (Feb. 23, 1981).

[20] McLellan, *The Organized Crime Act (S. 30) Or Its Critics: Which Threatens Civil Liberties?,* 46 Notre Dame Lawyer 55, 143 (1970).

[21] See authorities cited in *United States* v. *Anderson, supra,* 626 F.2d at 1364.

In applications of RICO to criminal enterprises, should the Court permit such use of the statute, the pattern-enterprise nexus will pose no great problem, for such cases generally present a sufficient *identity* between the pattern and the enterprise to satisfy the statutory requirement that the former be employed in conducting the affairs of the latter. When, however, RICO is applied, as in the instant case, to a legitimate enterprise, there will remain, unresolved by what this Court is likely to write in *Turkette,* complex, vexing and rapidly proliferating[22] questions concerning the nature and degree of the required relation of the "pattern of racketeering activity" to the "conduct of the affairs of the enterprise." Among those questions are the following, which the case at bar presents:

(a) The court below has held that guilt under RICO does not require advancement of the enterprise's affairs by the racketeering activity. App. A, *infra,* 11a. The court below is, in this respect, in clear conflict with the Fourth Circuit in *United States* v. *Webster,* No. 79-5204 (Jan. 15, 1981, *pet. for reh. filed* Feb. 2, 1981), *slip op.* at 29:

> "We, therefore, hold that the prosecution was required to prove that the 'enterprise' . . . had its affairs advanced or benefitted in some fashion, direct

---

[22] "RICO initially was not very popular among prosecutors. The reluctance to use it no doubt stemmed in part from its complexity and the fear of unleashing a Pandora's box of statutory interpretation problems. Beginning in 1975, the United States Justice Department Task Force specializing in RICO toured the country, lecturing to United States Attorneys and their assistants on the use of RICO. [Citation omitted.] After this promotional campaign, RICO has grown in popularity." *United States* v. *Anderson, supra,* 626 F.2d at 1364 n.8.

> or indirect, by the pattern of racketeering activity."[23]

(b) Aside from whether the impingement of the one element on the other must be in the nature of "advancement" or "benefit," *United States* v. *Webster* held at least that the *direction* of that impingement must be from the "pattern" element toward the "enterprise" element, and not the reverse. The court said (*slip op.* at 26):

> "[T]he statute should be applied in such a way as to punish where the racketeering activity advances the nonracketeering business but not where the only relation between the two consists of benefits which the racketeering activity derives from the nonracketeering enterprise. "

Similarly, the Seventh Circuit had earlier held in *United States* v. *Nerone,* 563 F.2d 836, 851 (1977), *cert. denied,* 435 U.S. 951 (1978), that a RICO prosecution cannot be founded on evidence that the racketeering activity was "facilitated through the cover of a legitimate enterprise." See also *United States* v. *Gibson,* 486 F. Supp. 1230, 1244 (S.D. Ohio 1980), where the court acquitted on a RICO count because:

> "[T]he prosecution has perverted the proof analysis. [It] has attempted to show only that Gibson engaged

---

[23] A subsidiary question is presented by a conflict of the opinion below, not with the opinion in *Webster,* but rather with a position there taken by the government. In the instant case, the court below expressed unconcern with whether the role played by the predicate acts in the enterprise's affairs was "major" or "minor" or, indeed, "any at all." App. A, *infra,* 10a. By contrast, the government conceded in *Webster* that there must be a "substantial nexus," arguing, however, "that it is sufficient under §1962(c) to show that the enterprise advances the interests of the racketeering activity." *Slip op.* at 24.

in a pattern of racketeering activity through the instrumentality of his union office, and not vice versa."[24]

The court below placed itself in conflict with the Fourth Circuit in *Webster* and the Seventh in *Nerone* (and, incidentally, with the district court *Gibson* opinion) when it found the pattern-enterprise nexus satisfied here by the fact that petitioner was "enabled to commit the predicate offenses solely by virtue of his position in the enterprise. . . ."[25] App. A, *infra,* 10a.

(c) The court below perpetuates and further confounds the prevalent confusion over the RICO pattern-enterprise nexus by denying the authority of the opinion of another circuit (*Nerone, supra)* and even of the Second Circuit itself in *United States* v. *Huber,* 603 F.2d

---

[24] The impropriety that defeated the RICO prosecution in all three of these cases (*Webster, Nerone,* and *Gibson)* — the misconception of the direction of movement of the pattern-enterprise nexus — was not a mere fortuity. It was rather the expression in each case of a view of 18 U.S.C. 1962(c) formally adopted by the Department of Justice in the *United States Attorneys' Manual* §9-110.101 (Jan. 17, 1977): "This section is designed to reach those persons who by employment or association in an enterprise *use that enterprise to engage in unlawful activities."* Emphasis added.

[25] The predicate acts in *Gibson* were embezzlements from the union in violation of 29 U.S.C. 501(c), an element of which is that the defendant occupy a union position. Contrary to the decision in the instant case, the *Gibson* court said: "Admittedly, the racketeering activity at issue here is connected to the operation of the union in the sense that Gibson would not have been able to accomplish the embezzlement of union funds but for his position with the union. We must presume, however, that had Congress desired to use RICO to prohibit all racketeering activity in connection with or through the instrumentality of a legitimate enterprise, it would have done so expressly." 486 F. Supp. at 1244.

387, 395 (1979), *cert. denied,* 445 U.S. 927 (1980), on the ground that they "involved challenge to . . . the indictment or to . . . the evidence; they did not discuss the language to be used in charging the jury. . . ." App. A, *infra,* 10a. It would seem essential to the federal judicial system that each circuit's opinions on what must be alleged and what must be proven in a RICO prosecution should receive respectful consideration by each other circuit on the issue of what must be told the jury as to what has been alleged and proven. We submit that, if the circuit courts of appeal ignore each other, this Court's intervention becomes imperative.

4. On the subjective aspect of the RICO offense, the holding below dispenses with a *mens rea* instruction, because, since no *mens rea* element is set forth in RICO, no mental element is required beyond that which is involved in the predicate offenses.[26] Petitioner's argument, however, was not that RICO *specified* a *mens rea* requirement but, rather, that since all of the specified predicate offenses, except the one non-intent §186 violation, involve a high degree of *mens rea,* Congress should not be held to have dispensed with *mens rea* in that one

---

[26] *Boylan,* relied on by the court below, differed from this case in that, in *Boylan,* the payments were made in violation of §186(a)(4) with intent to influence the conduct of union affairs, whereas here they were not claimed to have been made with any such intent. See *supra* note 5 and text thereat. The court below said, however, in *Boylan,* that the *mens rea* implicit in a §186(a) payment made with intent to influence does not carry over to the correlative §186(b) charge of receiving the payment, so that the "intent" instruction given in *Boylan* was "more favorable to defendant than required." 620 F.2d at 362. While the propriety of a construction of §186 that produces such an anomaly is open to question, that question need not be reached here. In the instant case, it is agreed that neither the §186(a) payments nor the §186(b) receipts were claimed to have involved *mens rea.*

instance alone, and the courts should interpret RICO as incorporating an intent requirement. That argument, we submit, merits this Court's consideration.

In *United States* v. *United States Gypsum Co.*, 438 U.S. 422 (1978), the Court referred to its "generally inhospitable attitude to non-*mens rea* offenses" (*id.* at 438) and recognized something akin to a presumption in favor of requiring *mens rea* in circumstances like those here. The Court quoted with approval from *Dennis* v. *United States*, 341 U.S. 494, 500 (1951), that "[t]he existence of a *mens rea* is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence." 438 U.S. at 436. The Court also quoted (*id.*) from *Morissette* v. *United States*, 342 U.S. 246, 250-51 (1952), to show that it was not speaking only of common law crimes.

Mr. Justice (then Judge) Blackmun, in *Holdridge* v. *United States*, 282 F.2d 302, 310 (8th Cir. 1960), thus summarized the factors that must be satisfied to overcome the presumption of a *mens rea* requirement:

> "[W]here a federal criminal statute omits mention of intent and where it seems to involve what is basically a matter of policy, where the standard imposed is, under the circumstances, reasonable and adherence thereto properly expected of a person, where the penalty is relatively small, where conviction does not gravely besmirch, where the statutory crime is not one taken over from the common law, and where congressional purpose is supporting, the statute can be construed as one not requiring criminal intent. The elimination of this element is then not violative of the due process clause."

In the case of RICO, virtually all of the conditions for attributing to Congress an intent to dispense with *mens rea* are absent. RICO does not involve "what is

basically a matter of policy"; it is not a public health and welfare statute like those involved in *United States* v. *Dotterweich*, 320 U.S. 277 (1943), and *United States* v. *Freed*, 401 U.S. 601 (1971). The statutory penalty under RICO, plainly, is far from small: imprisonment up to twenty years and a fine up to $25,000, plus substantial forfeitures.[27] And conviction does gravely besmirch: it brands a man a "racketeer."[28]

Most significantly, neither RICO nor its legislative history reflects any intent to depart from the mainstream of American criminal law by enacting a major felony statute that dispenses with *mens rea*. RICO was enacted against the background of criminal jurisprudence discussed in *Gypsum*. Neither the committee reports[29] nor the floor debates[30] evince an intent to depart from that jurisprudence.

---

[27] Congress was well aware of the gravity of a RICO offense and the seriousness of the penalties that could be imposed. See 115 Cong. Rec. 35193 (Oct. 6, 1970) (remarks of Rep. Poff); S. Rep. No. 91-617, 91st Cong., 1st Sess. 158 (1969). In *United States* v. *Heller*, 579 F.2d 990, 994-95 (6th cir. 1978), the court commented: "A defendant convicted of violating 18 U.S.C. §875(a) can be sentenced to twenty years imprisonment and fined $5,000. The concept of *malum prohibitum* crime simply does not square with that kind of an offense and with such severe punishment. . . . If we would have to imply an intent element to this offense, we would, because Congress is attempting to define a serious crime."

[28] When *The New York Times*, January 23, 1980, reported petitioner's sentencing, its page 1 headline read:"Scotto Gets 5-Year Term and Fine for Racketeering." App. 165.

[29] S. Rep. No. 91-617, 91st Cong., 1st Sess, (1969); H.R. Rep. No. 91-1549, 91st Cong., 1st Sess. (1970).

[30] 115 Cong. Rec. 575-607, 819-56, 952-72, 35191-217, 35287-364, 36280-93, 36294-96 (Jan. 21-23, Oct. 6-7, 12, 1970).

The most likely explanation of why Congress did not address the issue of *mens rea* in drafting RICO is that the other predicate offenses carry with them requirements for highly culpable *mens rea*. In this respect, §186 is an anomaly, possibly overlooked in the deliberations on the bill.[31] Requiring proof of *mens rea* when RICO is predicated on violations of §186 would not impede any congressional purpose to be served by RICO, since, for all the other predicate offenses, some proof of *mens rea* is required.

Plainly, the conditions specified in *Holdridge* and the "far more" required by *Gypsum*, 438 U.S. at 438, before dispensing with *mens rea* are not present here.

5. The defects in the holding below that petitioner may properly be convicted and sentenced on both RICO and the predicate Taft-Hartley violations are readily apparent.

First, §186 may be a lesser-included-offense within RICO even though the transaction RICO proscribes encompasses more than the one proscribed by §186; indeed, the lesser-included-offense doctrine presupposes that to be so.

Second, for the purpose of the *Blockburger* test, it is true that RICO (as we submit it *should be* construed)[32] requires proof of a fact — the pattern-enterprise nexus — that §186 does not, but the converse, which must also be true, is not.

---

[31] §186, although listed as a predicate offense, was not discussed in the committee reports or in the floor debates.

[32] If, as held below, the pattern-enterprise nexus may be satisfied by showing merely that "one is enabled to commit the predicate offenses solely by virtue of his position in the enterprise," then *neither* statute requires proof of a fact not required by the other, and under the *Blockburger* test there is double jeopardy.

Third, the dictum in *United States* v. *Rone* that the court below chose to rely on[33] is erroneous under this Court's opinion in *Whalen* v. *United States*, *supra*.

In *Whalen*, the Court held that the offense of rape merged into the offense of felony murder. The Court referred to the judicial "assumption" set forth in *Blockburger* that "Congress ordinarily does not intend to punish the same offense under two different statutes." 445 U.S. at 691-92. This presumption is fortified by the Fifth Amendment's protection against double jeopardy in the form of " 'multiple punishments for the same offense'." *Id.* at 688. "Accordingly, where two statutory provisions proscribe that 'same offense,' they are construed *not* to authorize cumulative punishments *in the absence of a clear indication of contrary legislative intent.*" *Id.* at 692 (emphasis added). There is no denying that the predicate offenses here are lesser-included-offenses within the RICO violation and the court below has cited nothing to overcome the presumption that Congress intended such offenses to merge.[34]

---

[33] "There is nothing in the RICO statutory scheme which would suggest that Congress intended to preclude separate convictions or consecutive sentences for a RICO offense and the underlying or predicate crimes which make up the racketeering pattern." 598 F.2d at 571. In addition to this dictum, *Rone* contained another, ignored by the court below, pointing in the opposite direction: "If the RICO §1962(c) charge was based solely on the two extortions (of which the defendant had been separately convicted and on which he had been cumulatively sentenced), there might be problems under *Blockburger*." *Id.*

[34] The government relied below on the provision in §904 (a) of the Organized Crime Control Act, Pub. L. No. 91-452, 84 Stat. 941 (1970), that the act "should be liberally construed to effectuate its remedial purposes." That provision, however, gives the government

There can be no doubt that Congress intended in RICO that, for participating in the conduct of the affairs of an enterprise by a pattern of two or more predicate acts, an individual becomes liable to the greater RICO

---

no support. Since RICO, in addition to its criminal provisions, does have provisions to effectuate its "remedial purposes" (see 18 U.S.C. 1964), §904(a) can be given its full effect by applying it to those remedial provisions. There is nothing to indicate that Congress meant, by enacting that section, to intrude into the process of *criminal* adjudication. It strongly appears that in §904(a), Congress was focusing on the novel remedies created by RICO for combatting organized crime. What was innovative about RICO was the provision for civil remedies and forfeitures. The Senate Report proudly announced: "Title IX [*i.e., RICO*] thus brings to bear on the infiltration of organized crime into legitimate business or other organizations the full panoply of civil *remedies*, including a civil investigative demand, now available in the antitrust area. The use of such *remedies* as prohibitory injunctions and the issuing of orders of divestment or dissolution is explicitly authorized. Nevertheless, it must be emphasized that these *remedies* are not exclusive, and that title IX seeks essentially *an economic, not a punitive goal*." S. Rep. No. 91-617, 91st Cong., 1st Sess. 91 (1969) (emphasis added). Thus, in §904(a), Congress did *not* provide that RICO shall be construed liberally in general, but rather that it "shall be liberally construed to effectuate *its remedial purposes*" (emphasis added). These "remedial purposes" are the "economic, not punitive" purposes explained in the Senate Committee Report. And what is to be construed liberally is not the definition of the RICO offense, but the provisions for civil *remedies*, as highlighted in the Committee Report.

As Judge Taylor said of §904(a) in *United States* v. *Mandel*, 415 F. Supp. 997, 1022 (D. Md. 1976):

> "While Congress may instruct courts to give broad interpretations to civil provisions, it cannot require courts to abandon the traditional canon of interpretation that ambiguities in criminal statutes are to be construed in favor of leniency. *Rewis* v. *United States*, [401 U.S. 808 (1971)]; *Bell* v. *United States*, 349 U.S. 81 . . . (1955). To do so would be to violate the principles of due process on which the canon of interpretation rests."

penalty. However, the government's position that Congress also intended to subject the individual to *both* the greater *and* the lesser penalties — especially where the lesser, predicate offenses are mere non-*mens rea* misdemeanors having no bearing on the affairs of the enterprise — is "based on no more than a guess as to what Congress intended." *Ladner* v. *United States*, 358 U.S. 169, 178 (1958).

We submit that the question here presented, so basically important to prosecutors in constructing RICO cases, to trial courts in framing their jury instructions and their sentences, and, not least, to defendants who find themselves convicted under RICO, should receive this Court's considerations.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

EDWARD BENNETT WILLIAMS
HAROLD UNGAR
RICHARD M. COOPER
WILLIAMS & CONNOLLY
839 17th Street, N.W.
Washington, D.C. 20006
(202) 331-5000

Counsel for Petitioner
Anthony M. Scotto

APPENDIX A

Opinion Below

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Nos. 1131-32 — September Term, 1979

(Argued May 20, 1980

Decided September 2, 1980)

Docket Nos. 80-1041, -1044

UNITED STATES OF AMERICA, *Appellee,*

v.

ANTHONY M. SCOTTO and
ANTHONY ANASTASIO, *Appellants.*

(Filed September 2, 1980)

Before OAKES and MESKILL, *Circuit Judges,* and BONSAL, *District Judge.**

Appeal from judgments after a jury trial entered in the United States District Court for the Southern District of New York, Charles E. Stewart, *Judge,* convicting appellant Scotto of violation of the Racketeer Influenced and Corrupt Organizations (RICO) statute, 18 U.S.C. §1962(c), and convicting appellants Scotto and Anastasio of conspiracy to violate the RICO statute, 18 U.S.C. §1962(d), Taft-Hartley violations, 29 U.S.C. §186(b), and income tax violations, 26 U.S.C. §§7201, 7206(1). Over allegations of errors in the district court's charges to the jury and rulings on appellants' misjoinder claims, the judgments are affirmed.

EDWARD BENNETT WILLIAMS
Washington, D.C. (Williams
& Connolly, Harold
Ungar, Richard M.
Cooper, of counsel),
for Appellant Scotto.

---

* Senior District Judge of the Southern District of New York, sitting by designation.

MICHAEL E. TIGAR
Washington, D.C. (John Mage, Lynne Bernabei,

Washington, D.C., Gustave H. Newman, New York, New York, of counsel), *for Appellant Anastasio.*

ALAN LEVINE
Assistant United States Attorney (William M. Tendy, United States Attorney for the Southern District of New York, Scott W. Muller, Howard W. Goldstein, Assistant United States Attorneys, of counsel), *for Appellee.*

OAKES, *Circuit Judge:*

Anthony M. Scotto and Anthony Anastasio, not contesting the sufficiency of the evidence, appeal from judgments of convictions on forty-three counts entered after an eight-week jury trial in the United States District Court for the Southern District of New York, Charles E. Stewart, Judge. The counts included one against Scotto, then president of Local 1814 of the International Longshoremen's Association (ILA), for participating in the affairs of the ILA through a pattern of racketeering activity from 1974 through part of January 1979 in violation of 18 U.S.C. §1962(c) (Count 1); a count charging both Scotto and Anastasio, then executive vice president of Local 1814, with conspiring to participate in the affairs of the ILA through a pattern of racketeering activity, in violation of 18 U.S.C. §1962(d) (Count 50); twenty-four counts against Scotto (Counts 2-9, 16-30, 34), eight counts against Anastasio (38-45) and three counts against both (Counts 35-37) for demanding and receiving unlawful "labor"

payments totalling in excess of $250,000, in violation of the Taft-Hartley Act, 29 U.S.C. §186(b); and four counts against Scotto (Counts 53-56) and two counts against Anastasio (Counts 59, 60) for failure to report and pay federal income taxes on the unlawful amounts obtained from the foregoing activities, in violation of 26 U.S.C. §§7201 and 7206(1). The jury was unable to reach a verdict on seventeen other counts alleging additional Taft-Hartley and tax violations (Counts 10-15, 31-33, 46-49, 51-52, 57-58). The sentences are set out in the margin.[1] We affirm the judgments.

---

[1] Scotto was sentenced to five years' imprisonment and a $25,000 fine on Count 1; consecutive one-year terms of imprisonment on Counts 2-6, for a total of five years, to run concurrently with the sentence imposed on Count 1; $5,000 fines on Counts 2-6, totaling $25,000; five years' probation on each of Counts 7-9, to run concurrently and to commence upon expiration of the period of incarceration; $5,000 fines on Counts 16-20, totaling $25,000; a suspended sentence and five years' probation on Counts 21-30 and 34-37; a suspended sentence, five years' probation to run concurrently with the sentence imposed on Count 1, and a $25,000 fine on Count 50; five years' imprisonment on each of Counts 53 and 55, to run concurrently with the sentence on Count 1; and three years' imprisonment on each of Counts 54 and 56, to run concurrently and concurrently with the sentence imposed on Count 1. Thus, the effective sentence imposed on Scotto was five years' imprisonment, with five years' probation following completion of his prison term, and $75,000 in fines.

Anastasio was sentenced to concurrent one-year terms of imprisonment and concurrent fines of $5,000 on Counts 38-42; concurrent one-year terms of imprisonment, consecutive to the one-year term imposed on Count 38, and concurrent $5,000 fines on Counts 35-37 and 43-45, the fines imposed concurrently with the $5,000 concurrent fines on Counts 38-42; a concurrent two-year term of imprisonment and concurrent $5,000 fine on Count 50; and a suspended sentence and five years' probation on Counts 59-60. This amounted to an effective sentence of two years in prison, five years' probation, and a $5,000 fine.

FACTS

From 1975 through 1979, appellant Scotto was president of ILA Local 1814 in Brooklyn and vice president for legislative affairs for the ILA nationally. From 1975 through April of 1978, Anastasio was secretary-treasurer of an associated ILA local in Brooklyn, and he subsequently became executive vice president of Scotto's Local 1814. He was also an ILA national organizer. The Government's evidence was that they individually and jointly received illegal labor payoffs during the period from 1975 through 1979 from six separate waterfront businesses employing ILA members. The evidence showed the receipt of more than forty separate cash payments, some as high as $15,000, as kickbacks or commissions on business and as "extra" Christmas bonuses.

Walter D. O'Hearn, chief executive of John W. McGrath Corp. of Brooklyn, a stevedore company, paid Scotto $15,000 quarterly and $5,000 at Christmas, for a total of $65,000 annually, to obtain his assistance in reducing fraudulent and exaggerated workmen's compensation claims filed by members of Scotto's local. William Montella, general manager of Quin Marine Services, Inc., of Brooklyn, paid Scotto $5,000 quarterly and $5,000 extra each Christmas for a three-year period to secure his assistance in getting new business and keeping existing customers from competitor shipping and stevedoring companies with which Scotto dealt as a labor leader. Nicholas Seregos of Jackson Engineering Co., Inc., an ILA-affiliated marine engineering company doing general ship repair, paid Anastasio a 10% "commission" on business obtained for his company with Scotto's and Anastasio's assistance from Prudential Lines, Inc., and United States Lines. Additionally, other cash payments of thousands of dollars were received by Scotto alone or by Scotto and Anastasio from individuals representing waterfront employers of ILA labor, including C. C. Lumber Co. of Brooklyn, American Navigation Co. of Baltimore, Marine Repair Services, Inc., of Staten Island, and Joseph Vinal Ship Maintenance Co. of Manhattan. The proof also established

that Scotto and Anastasio failed to declare the payoffs on their federal income tax returns, amounting in Scotto's case to $69,700 in 1975, $90,000 in 1976, and $83,500 in 1977, and in Anastasio's case to $6,500 in 1976 and $16,500 in 1977.

Scotto, who took the stand in his own defense, denied receiving any payments from Montella or O'Hearn before January of 1977. As to the payments made thereafter, Scotto admitted accepting them, but claimed he was acting only as a conduit for campaign contributions, $50,000 to the 1977 New York City mayoral campaign of Mario Cuomo, and $25,000 to the 1978 New York State gubernatorial campaign of Governor Hugh Carey. Louis Valentino, a state official, testified that he received the $50,000 in cash for the Cuomo campaign from Anastasio at Scotto's direction, and Joseph Colozza, an ILA official from Scotto's local in charge of Governor Carey's Queens campaign, testified to receiving $25,000 in cash from Scotto. However, no records of these transactions and no reports to the New York State Board of Elections were ever made. Cross-examination of Scotto revealed that, in a tape-recorded conversation with Montella in October 1978, Scotto said that if any inquiries were ever made, he would claim the illegal monies received were for political and charitable contributions. Scotto denied the 10% commission arrangement with Nicholas Seregos, as well as receipt of any cash payoffs by Scotto and Anastasio from Joseph Vinal Ship Maintenance Co. or Marine Repair Services, Inc. He explained that the cash payment from Joseph Lacqua, an officer of C.C. Lumber Co. and American Navigation Co., was intended for and ultimately given to Scotto's wife. The jury disbelieved the "conduit" defense and other exculpatory testimony.

Anastasio did not testify on his own behalf. He did call one character witness and Anthony Valvo, a shop steward who testified to contacting Anastasio on behalf of Seregos in 1974 concerning the unionizing of Jackson Engineering Co.

Discussion

I. The RICO and RICO conspiracy convictions — instruction on the element of "conduct of [the] enterprise's affairs"

Among the principal arguments on appeal are those focusing on the "RICO" and "RICO conspiracy" convictions. RICO, an acronym for that part of the Organized Crime Control Act of 1970 dealing with Racketeer Influenced and Corrupt Organizations, 18 U.S.C. §§1961-68; *see generally* H.R. Rep. No. 91-1549, 91st Cong., 2d Sess., *reprinted in* [1970] U.S. Code Cong. & Ad. News 4007, 4010, 4032-33, specifically includes within its definition of "racketeering activity" a wide variety of serious criminal acts under federal and state law, among them "any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations)." *Id.* §1961(1)(C). It furthermore defines "pattern of racketeering activity" as "requir[ing] at least two acts of racketeering activity." *Id.* §1961(5). The term "enterprise" includes "any union." *Id.* §1961(4). Under 18 U.S.C. §1962(c),[2] it is

[2] 18 U.S.C. §1962 provides in part:

> (a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity . . . to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in or the activities of which affect, interstate or foreign commerce. . . .
>
> (b) It shall be unlawful for any person through a pattern of racketeering activity . . . to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.
>
> (c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity. . . .
>
> (d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

unlawful "for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity. . . ." *Id.* There also is a prohibition against "conspir[ing] to violate any of the provisions" of subsection (c) of §1962. *Id.* (d).

The RICO statute has been upheld as not unconstitutionally vague. *E.g., United States* v. *Huber,* 603 F.2d 387, 393 (2d Cir. 1979), *cert. denied,* 100 S. Ct. 1312 (1980); *United States* v. *Swiderski,* 593 F.2d 1246, 1249 (D.C. Cir. 1978), *cert. denied,* 441 U.S. 933 (1979); *United States* v. *Campanale,* 518 F.2d 352, 364 (9th Cir. 1975) (per curiam), *cert. denied,* 423 U.S. 1050 (1976); *United States* v. *Field,* 432 F. Supp. 55, 58 (S.D.N.Y. 1977), *aff'd,* 578 F.2d 1371 (2d Cir.), *cert. dismissed,* 439 U.S. 801 (1978). It has been applied in a variety of circumstances, *e.g., United States* v. *Boylan,* 620 F.2d 359, 360-62 (2d Cir. 1980) (RICO count and illegal labor payments counts not multiplicitous and not violative of double jeopardy; RICO count does not include separate scienter element over and above that required for predicate crimes), *petition for cert. filed,* 48 U.S.L.W. 3787 (U.S. May 20, 1980); *United States* v. *Weisman,* No. 79-1315, slip op. at 2229 (2d Cir. Apr. 4, 1980), *petition for cert. filed,* 49 U.S.L.W. 3018 (U.S. July 10, 1980) (affairs of theater conducted through a pattern of racketeering activity including predicate acts of securities and bankruptcy fraud); *United States* v. *Huber, supra,* 603 F.2d at 387 (pattern of racketeering activity involving fraudulent execution of medical services and supplies contracts by a group of corporations).

Appellant Scotto's basic argument is that the jury was inadequately instructed on the issue whether he conducted the union's affairs through a pattern of racketeering activity, namely through the Taft-Hartley violations. He suggests that the district court's charge was inadequate because of a failure to require a sufficient nexus between the predicate misconduct and the conduct of the enterprise, and a failure to explore

more fully the statutory language pertaining to the "conduct of such enterprise's affairs." Scotto notes that in cases in which an established legitimate entity as opposed to a criminal enterprise is involved, the conduct of the affairs element assumes great significance. Appellant places principal reliance on *United States* v. *Nerone,* 563 F.2d 836, 851-52 (7th Cir. 1977), *cert. denied,* 435 U.S. 951 (1978), holding that the Government's case failed because of inadequate proof of a connection between the racketeering activities, illegal gambling, and the corporation operating the trailer park where the gambling occurred. *See also United States* v. *Huber, supra,* 603 F.2d at 395 (summarizing *Nerone).* He also cites, among other cases, *United States* v. *Dennis,* 458 F. Supp. 197 (E.D. Mo. 1978), in which the court found an indictment faulty under RICO because of its failure to assert any nexus between the alleged activities and the conduct of the enterprise. The court noted: "The mere fact that defendant is employed by the enterprise [General Motors Assembly Division] and collects unlawful debts on the premises of the enterprise . . . does not establish that the defendant participated in the conduct of the enterprise's affairs through the collection of the debts." *Id.* at 199.

The Government first argues that Scotto failed properly to preserve this claim regarding the court's jury charge. It is true that the district court during an all-day charging conference read verbatim the portion of its charge about which Scotto now complains and that defense counsel at that time declined to object to the charge. However, Scotto did both submit his own request to charge on the subject[3] and make a

---

[3] The statute requires not only that you find two substantive crimes to establish a pattern of racketeering activity, you must also find that the defendant Scotto conducted the affairs of the I.L.A. through the alleged pattern of racketeering. In order to find that the defendant Scotto conducted the I.L.A.'s affairs through a pattern of racketeering, you must find that both of the alleged labor violations *concerned or related to the operation or management of the enterprise. You must find that the pattern of racketeering [a]ffected the affairs of the I.L.A. in its essential functions.* In order to find that the affairs of the

blanket objection to the court's failure to incorporate Scotto's suggested charges in the court's instructions. Assuming without deciding that Scotto has preserved his appeal, we reach the merits of this faulty instruction issue.

The district court instructed the jury that the Government must prove beyond a reasonable doubt:

> [T]hat through the two or more of these connected racketeering offenses the defendant Scotto conducted or participated directly or indirectly in the conduct of the affairs of that enterprise.

And the court went on to explain:

> [Y]ou must find beyond a reasonable doubt that the defendant committed the two or more of the offenses alleged in Counts 2 through 37 *while and as part of conducting or participating either directly or indirectly in the conduct of the affairs of the enterprise.*
>
> In this regard it is not necessary for the Government to prove that the affairs of the enterprise were advanced by the defendant's activities, although you may find this to be true, or that the particular enterprise was corrupt or that the enterprise authorized the defendant to commit the particular acts of racketeering activity alleged.
>
> It is only necessary to find that the acts were committed by the defendant or caused to be committed by him in the conduct of, or his participation in, the affairs of the enterprise. (Emphasis added.)

I.L.A. were conducted through a pattern of racketeering you must find beyond a reasonable doubt *that there was a connection between the so-called acts of racketeering and the affairs of the I.L.A.* If this essential connection has not been proved then you must acquit the defendant Scotto of the charge in Count I, even if you find that all of the alleged payments were unlawfully made. (Emphasis added.) Appendix to Brief of Appellant Scotto at 46.

Appellant wanted the court to state that the jury was required to find that the predicate acts "concerned or related to the operation or management of the enterprise" and "[a]ffected the affairs of the I.L.A. in its essential functions." But appellant cites no case demanding that a jury charge include his proposed or similar language. *United States* v. *Huber, supra,* and *United States* v. *Nerone, supra,* two of the cases upon which appellant relies, involved challenges to allegations in the indictment or to the sufficiency of the evidence; they did not discuss the language to be used in charging the jury about the conduct of the enterprise. In any event, their holdings concerning the degree of interrelationship required do not go as far as appellant would like. We agree with Judge Pierce, in *United States* v. *Stofsky,* 409 F. Supp. 609 (S.D.N.Y. 1973), *aff'd,* 527 F.2d 237 (2d Cir. 1975), *cert. denied,* 429 U.S. 819 (1976), that the statute "does not define [the] connection by distinguishing between predicate acts which play a major or a minor role, or any role at all, in what might be seen as the usual operations of the enterprise; nor does it require that such acts be in furtherance of the enterprise. . . ." *Id.* at 613. The statute, then, declines to define in quantitative terms the degree of interrelationship between the pattern of racketeering and the conduct of the enterprise's affairs.

We think that one conducts the activities of an enterprise through a pattern of racketeering when (1) one is enabled to commit the predicate offenses solely by virtue of his position in the enterprise or involvement in or control over the affairs of the enterprise, or (2) the predicate offenses are related to the activities of that enterprise. Simply committing predicate acts which are unrelated to the enterprise or one's position within it would be insufficient. *Cf. United States* v. *Rubin,* 559 F.2d 975, 990 (5th Cir. 1977), *vacated on other grounds,* 439 U.S. 810 (1978), *rev'd in part on other grounds,* 591 F.2d 278 (5th Cir. 1979) (RICO requires "some relationship between the proscribed acts and the maintenance of union posi-

tion''). But, as Judge Lasker noted in *United States* v. *Field, supra:*

> Section 1962(c) nowhere requires proof regarding the advancement of the union's affairs by the defendant's activities, or proof that the union itself is corrupt, or proof that the union authorized the defendant to do whatever acts form the basis for the charge. It requires only that the government establish that the defendant's acts were committed in the conduct of the union's affairs.

432 F. Supp. at 58. Furthermore, we do not think it necessary for a person to solidify or otherwise enhance his position in the enterprise through commission of the predicate violations.

The court below properly told the jury that it was necessary to find that the defendant committed two or more of the offenses alleged in Counts 2 through 37 ''while and as part of conducting or participating either directly or indirectly in the conduct of the affairs of the enterprise.'' The charge did not have to require that the ILA was itself corrupted or even that the union's policies and administration were changed by the racketeering pattern. Judge Stewart in this case emphasized more clearly the need for a connection than a charge upheld in *United States* v. *Rubin, supra*, 559 F.2d at 989-90. There, the Fifth Circuit declined to find reversible error in the district court's failure to add to the charge the defendant's proffered words ''by means of,'' in addition to the word ''through,'' and approved an instruction, tracking the language of §1962(c), that the Government had to prove that the defendant participated in the affairs of the union ''through'' the two or more offenses. We thus find no error in this part of the charge.

II. RICO — mens rea

Appellant Scotto argues that the RICO conviction is invalid and both appellants allege that the RICO conspiracy convictions are invalid because the district court failed to instruct the jury adequately on *mens rea*. The statute on its face is silent on the issue of *mens rea*. Scotto attributes the lack of

mens rea language in the RICO statute to a congressional oversight. Appellants argue that this silence is ordinarily overlooked because most of the predicate offenses listed in §1961, such as murder, kidnapping, arson and robbery, themselves require high degrees of *mens rea*. Unlike these other listed predicate offenses, a Taft-Hartley violation of 29 U.S.C. §186[4] is a non-*mens rea* misdemeanor. Consequently, their argument runs, a RICO indictment predicated solely on violations of §186 could produce a twenty-year sentence without any proof of *mens rea*, an unfair result, unless RICO *itself* supplies some additional *mens rea* requirement.

As we recently stated in *United States* v. *Boylan*, 620 F.2d at 361-62, "[t]he RICO count does not include a scienter element over and above that required by the predicate crimes, in this case the violations of 29 U.S.C. §186(b)(1)." The charge delivered by the district court in *Boylan*, which imposed an intent element on the defendant as a taker of a

---

[4] 29 U.S.C. §186 provides in part:

> (a) It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value —
>
> (1) to any representative of any of his employees who are employed in an industry affecting commerce; or
>
> (2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce; or
>
> . . .
>
> (4) to any officer or employee of a labor organization engaged in an industry affecting commerce with intent to influence him in respect to any of his actions, decisions, or duties as a representative of employees or as such officer or employee of such labor organization.
>
> (b) (1) It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a) of this section.

§186(a) payment, was upheld and characterized as "more favorable to defendant than required by *United States* v. *Ricciardi*, 357 F.2d 91, 99 (2d Cir. 1966)." *Boylan*, 620 F.2d at 362. In the instant case, Judge Stewart required the jury, before it rendered RICO convictions, to find that the defendant under consideration "acted wilfully and knowingly," that he "knew what he was doing and that he did it deliberately and voluntarily," that he acted "knowingly and deliberately with a criminal motive or purpose," and that he "was aware of the general unlawful nature of his act."

Scotto further argues that the instruction was improper because it did not require the jury to find a willful violation of RICO. Relying on *United States* v. *Winston*, 558 F.2d 105, 107-09 (2d Cir. 1977), he defines the term "willfully" as intentionally violating a "known legal duty." *Winston*, however, involved a violation of Subsection Tenth, §2 of the Railway Labor Act, 45 U.S.C. §152, which specifically requires a "willful failure . . . to comply with the terms" of *other* subsections of the law. The law at issue here does not demand willful violations of the RICO statute, nor does it require willful violations of the predicate offenses, which would make the *Winston* case analagous. Therefore, although the Government concedes that willfully committing some unlawful predicate act is necessary, no specific intent to engage in an unlawful pattern of racketeering prohibited by RICO is required. Here, as in *Boylan*, we think the court's charge was favorable to the defendant because it permitted conviction under RICO only if the jury found a "criminal motive or purpose." Even the cases cited by Scotto do not require as much.

The argument made by both appellants attacking the district court's view of the intent necessary for a RICO conspiracy conviction also lacks werit. In the part of the jury charge dealing with the conspiracy count, Judge Stewart repeated some of the language from his charge on the substantive RICO offense. He also stated at one point that appellants must be found to have "participated in the conspiracy with a specific and criminal intent, that is, a purpose

to violate the law." If anything, the district court erred in favor of the appellants by delivering this portion of the charge in which it implied that a specific intent to violate the RICO conspiracy provision was required. We have no reason to believe, however, from the words of the statute or from general criminal law doctrine, that the quantum of *mens rea* required for a RICO conspiracy conviction should be different from or greater than that required for a substantive RICO offense. 18 U.S.C. §1962(d). *See United States* v. *Feola*, 420 U.S. 671, 686-88 (1975); *United States* v. *Mauro*, 501 F.2d 45, 51 (2d Cir.), *cert. denied*, 419 U.S. 969 (1974).

III. Section 186 counts as lesser included offenses in RICO

Appellant Scotto argues that multiple sentences, even if concurrent, cannot be imposed for violations of RICO and §186 because §186 Taft-Hartley Act violations are lesser included offenses, citing *United States* v. *Umans*, 368 F.2d 725, 730 (2d Cir. 1966), *cert. dismissed*, 389 U.S. 80 (1967). The argument is that §186 violations are lesser included offenses because all of their elements, plus other elements, must be proved to show a RICO violation predicated as here on violations of §186. *See Sansone* v. *United States*, 380 U.S. 343, 349-50 (1965) (defining lesser included offenses); *United States* v. *Markis*, 352 F.2d 860, 865-67 (2d Cir. 1965), *vacated on other grounds*, 387 U.S. 425 (1967).

This issue was, however, resolved contrary to appellant Scotto's position in *United States* v. *Boylan*, *supra*, 620 F.2d at 360-61. In *Boylan* this court held that RICO and §186 violations are "separate crimes, separately punishable," because they "do not proscribe the same act of transaction, and they implement different congressional purposes." *Id.* at 361. *See also United States* v. *Rone*, 598 F.2d 564, 571 (9th Cir. 1979), *cert. denied*, 100 S. Ct. 1345 (1980).

IV. Violation of 29 U.S.C. §186(b)(1) is a RICO predicate offense

Appellants contend that the only illegal payments that can serve as predicate offenses to a RICO violation are those

prohibited by 29 U.S.C. §186(a)(4) — a bribery provision.[5] Here, the Taft-Hartley predicate offenses charged involved the receipt of payments from an employer by a representative of his employees in violation of §186(b). Because the definition of "racketeering activity" in 18 U.S.C. §1961(1)(C) makes a violation of any part of §186 a sufficient predicate offense on which to base a RICO conviction, we reject appellants' claim. The legislative history presented by appellant Anastasio fails to convince us that the RICO statute should be given any reading other than the one indicated by its words themselves.

V. The court's charge on the elements of §186

Appellant Scotto contends that the district court improperly instructed the jury regarding the definition of the "thing of value" required to be received for a §186(b) violation. This claim relates to his "conduit" defense that the O'Hearn and Montella payments were for political campaign contributions. The court's charge defined "thing of value" as "any material thing with a monetary value" and noted that with respect to the conduit defense, the Government could not prevail if, in addition to certain other facts, the jury found that Scotto "did not benefit in any way by the payment or delivery of the money to him." This portion of the instructions was not expressly objected to at trial. Indeed, Scotto expressly agreed in the charging conference that he was required not to "benefit" from any payments. Nor was any objection made during the charging conference, a transcript of which we have reviewed, to the suggestion made by United States Attorney Fiske and later incorporated in the charge that the jury might find a benefit to Scotto simply from his delivery of campaign contributions. While we have some doubt about whether mere goodwill from delivering such contributions is properly within the meaning of "thing of value" under §186(b)(1), we do not find that part of the charge to constitute "plain error," under Fed. R. Crim. P. 52(b), in the context of long and complicated instructions. *See United*

[5] *Id.*

States v. *Calfon*, 607 F.2d 29, 31 (2d Cir. 1979), *cert. denied*, 100 S. Ct. 1044 (1980).

Nor was the district court required, as Scotto contends, to charge the jury that Scotto had to "know" that the benefit he was receiving was a "thing of value" before he could be convicted of a §186(b) violation. This issue was not raised below and no such instruction was requested. Moreover, nothing in the language of §186 requires knowledge that what one is receiving is a "thing of value." *But see United States* v. *Holt*, 333 F.2d 455, 456-57 (2d Cir. 1964), *cert. denied*, 380 U.S. 942 (1965) (instruction upheld requiring knowledge that §186(b) payment was a thing of value and that it was being given by an employing company to a union leader). All that is required is an awareness of the benefit itself.

VI. Taxation of "things of value"

In a rather farfetched argument, appellant Scotto maintains that his tax convictions under Counts 55-56 should be reversed because the jury might have mistakenly thought that an intangible benefit received from conveying political contributions would constitute taxable income. He bases this contention on the fact that the district court repeated the term "things of value," used earlier in discussing the Taft-Hartley counts, to explain to the jury what constituted taxable income. In the context of the entire charge, however, we believe there was little or no chance that the jury would apply to the tax counts the district court's previous explanation of what would be a sufficient "benefit" necessary to find guilt under §186(b). Furthermore, the district court was not required as Scotto contends to tell the jury that the defense to Counts 53 and 54 was different from that to Counts 55 and 56.

VII. Misjoinder of defendants

Appellant Anastasio argues that he was misjoined with Scotto in violation of Fed. R. Crim. P. 8(b) and 14. We are convinced that he failed to make before trial the 8(b) motion which he now advances, as is required in order to preserve it

on appeal. *United States* v. *Papadakis*, 510 F.2d 287, 300 (2d Cir.), *cert. denied*, 421 U.S. 950 (1975). A proper 8(b) motion must be granted if the indictment violates the rule. Anastasio did make a timely motion under Rule 14, which provides for the discretionary severance of either counts or defendants, asking the district court to order a separate trial for each defendant. Asserting that the 8(b) issue is dispositive, however, he does not now argue on appeal that the trial judge abused his discretion in denying the Rule 14 motion. Nor do we think that there was such an abuse, since it was alleged (and proven) that the codefendants participated as partners in respect to certain of the payments.

Appellant Scotto offered a motion under Rule 8, as well as a motion under Rule 14, before the trial began. He moved pursuant to both rules to sever himself from Anastasio or, in the alternative, to sever a number of new substantive Taft-Hartley counts in a superseding indictment charging Anastasio with the Seregos payments. Anastasio did not join in this motion, we assume for practical reasons since if the motion were granted in the alternative he would be required to stand trial twice.

On September 10, 1979, the day before the trial started, the Government filed a superseding indictment, dropping a mail fraud charge as well as four Taft-Hartley counts against Scotto alone. At that time Scotto renewed his earlier severance motions. In the alternative, Scotto moved to dismiss the RICO conspiracy count on the ground that there were now not one but multiple conspiracies charged. Anastasio's counsel "join[ed] in the application for a severance of [his] client. . . . " Neither defendant moved to sever the substantive racketeering count and the Taft-Hartley counts against Scotto alone from the other counts charging Scotto and Anastasio together. Thus by the time the trial commenced Anastasio had not moved the court to sever the charges against Scotto alone from the charges against both Scotto and himself. But even if Anastasio did properly raise the 8(b) issue that he now argues, there were sufficient allegations and

proof that Anastasio and Scotto participated in the same series of transactions, which included the racketeering counts and the racketeering conspiracy counts. The former is thus in no better a position than the appellant Cannatella in *United States* v. *Weisman, supra*, slip op. at 2252-54, who was not named in any RICO count or the securities fraud counts charged in the indictment against the other defendants but whose 8(b) motion was denied since, as the rule specifically provides, "all of the defendants need not be charged in each count."

Appellant Scotto also raises a misjoinder argument. Concededly, he filed a timely motion pursuant to Rules 8 and 14, which argued that the substantive Taft-Hartley counts against Anastasio (Counts 38-49) were misjoined. Those counts against Anastasio alone relate to different payments made by Seregos of Jackson Engineering Co., Inc., in the years 1977, 1978, and 1979. Jackson Engineering is also a subject of the overt acts listed in the conspiracy count. Accordingly we do not think that this joinder was erroneous. Even if it were erroneous, it would constitute harmless error in Scotto's case. *United States* v. *Werner*, 620 F.2d 922 (2d Cir. 1980).

We have carefully considered any and all other contentions of the appellants and find them to be without merit. Accordingly the judgments are affirmed.

APPENDIX B

Order of Mar. 6, 1981, Denying Rehearing.

UNITED STATES COURT OF APPEALS SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 6th day of March one thousand nine hundred and eighty-one.

No. 80-1041 80-1044

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*

v.

ANTHONY M. SCOTTO, ANTHONY ANASTASIO, VINCENT MARINO, JOSEPH LACQUA, *Defendants,*

ANTHONY M. SCOTTO, ANTHONY ANASTASIO, *Defendants-Appellants.*

(Filed March 6, 1981)

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the defendant-appellant, Anthony M. Scotto,

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge on the panel that heard the appeal and that no such judge has requested that a vote be taken thereon.

/s/ A. DANIEL FUSARO
A. Daniel Fusaro,
Clerk

APPENDIX C

Statutes Involved

Racketeer Influenced And Corrupt Organizations, 18 U.S.C. 1961, *et seq.*

§1961. Definitions

As used in this chapter—

(1) "racketeering activity" means (A) any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), sections 2314 and 2315 (relating to interstate transportation of stolen property), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic); (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds); or (D) any offense involving fraud connected with a case under title 11, fraud in the sale of securities, or the felonious manufacture, importation, receiv-

PRECEDING PAGE WAS BLANK

ing, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States;

(2) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof;

(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

(6) "unlawful debt" means a debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate;

(7) "racketeering investigator" means any attorney or investigator so designated by the Attorney General and charged with the duty of enforcing or carrying into effect this chapter;

(8) "racketeering investigation" means any inquiry conducted by any racketeering investigator for the purpose of ascertaining whether any person has been involved in any

violation of this chapter or of any final order, judgment, or decree of any court of the United States, duly entered in any case or proceeding arising under this chapter;

(9) "documentary material" includes any book, paper, document, record, recording, or other material; and

(10) "Attorney General" includes the Attorney General of the United States, the Deputy Attorney General of the United States, any Assistant Attorney General of the United States, or any employee of the Department of Justice or any employee of any department or agency of the United States so designated by the Attorney General to carry out the powers conferred on the Attorney General by this chapter. Any department or agency so designated may use in investigations authorized by this chapter either the investigative provisions of this chapter or the investigative power of such department or agency otherwise conferred by law.

§1962. Prohibited activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

§1963. Criminal penalties

(a) Whoever violates any provision of section 1962 of this chapter shall be fined not more than $25,000 or imprisoned not more than twenty years, or both, and shall forfeit to the United States (1) any interest he has acquired or maintained in violation of section 1962, and (2) any interest in, security of, claim against, or property or contractual right of any kind affording a source of influence over, any enterprise which he has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962.

(b) In any action brought by the United States under this section, the district courts of the United States shall have jurisdiction to enter such restraining orders or prohibitions, or to take such other actions, including, but not limited to, the acceptance of satisfactory performance bonds, in connection with any property or other interest subject to forfeiture under this section, as it shall deem proper.

(c) Upon conviction of a person under this section, the court shall authorize the Attorney General to seize all property or other interest declared forfeited under this section upon such terms and conditions as the court shall deem proper. If a property right or other interest is not exercisable or

transferable for value by the United States, it shall expire, and shall not revert to the convicted person. All provisions of law relating to the disposition of property, or the proceeds from the sale thereof, or the remission or mitigation of forfeitures for violation of the customs laws, and the compromise of claims and the award of compensation to informers in respect of such forfeitures shall apply to forfeitures incurred, or alleged to have been incurred, under the provisions of this section, insofar as applicable and not inconsistent with the provisions hereof. Such duties as are imposed upon the collector of customs or any other person with respect to the disposition of property under the customs laws shall be performed under this chapter by the Attorney General. The United States shall dispose of all such property as soon as commercially feasible, making due provision for the rights of innocent persons.

§1964. Civil remedies

(a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

(b) The Attorney General may institute proceedings under this section. In any action brought by the United States under this section, the court shall proceed as soon as practicable to the hearing and determination thereof. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

(d) A final judgment or decree rendered in favor of the United States in any criminal proceeding brought by the United States under this chapter shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding brought by the United States.

* * *

Taft-Hartley Act, 29 U.S.C. 186

(a) It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value—

(1) to any representative of any of his employees who are employed in an industry affecting commerce; or

(2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce; or

(3) to any employee or group or committee of employees of such employer employed in an industry affecting commerce in excess of their normal compensation for the purpose of causing such employee or group or committee directly or indirectly to influence any other employees in the exercise of the right to organize and bargain collectively through representatives of their own choosing; or

(4) to any officer or employee of a labor organization engaged in an industry affecting commerce with intent to

influence him in respect to any of his actions, decisions, or duties as a representative of employees or as such officer or employee of such labor organization.

(b)(1) It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a) of this section.

* * *

(d) Any person who willfully violates any of the provisions of this section shall, upon conviction thereof, be guilty of a misdemeanor and be subject to a fine of not more than $10,000 or to imprisonment for not more than one year, or both.

* * *

Nos. 80-1679 and 80-1746

JUN 1 1
ALEXANDER L

In the Supreme Court of the United States

OCTOBER TERM, 1980

ANTHONY M. SCOTTO, PETITIONER

v.

UNITED STATES OF AMERICA

ANTHONY ANASTASIO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General

D. LOWELL JENSEN
Assistant Attorney General

PATTY MERKAMP STEMLER
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether the district court properly instructed the jury on the provision of the Racketeer Influenced and Corrupt Organizations Act (RICO) prohibiting the conduct of the affairs of an enterprise "through" a pattern of racketeering activity (No. 80-1679).

2. Whether the district court properly instructed the jury on the intent element of RICO (No. 80-1679).

3. Whether violations of the Taft-Hartley Act, 29 U.S.C. 186(a)(1) and (b)(1), can be a racketeering activity under RICO (No. 80-1746).

4. Whether, in a single proceeding, a defendant can be separately convicted and punished for both a substantive RICO offense and the underlying acts of racketeering (No. 80-1679).

5. Whether there was reversible error in the joinder of petitioner Anastasio (No. 80-1746).

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	1
Argument	3
Conclusion	11
Appendix	1a

TABLE OF AUTHORITIES

Cases:

Albernaz v. *United States*, No. 79-1709 (Mar. 9, 1981) 10

Andresen v. *Maryland*, 427 U.S. 463 8

Barnes v. *United States*, 412 U.S. 837 8

Henderson v. *Kibbe*, 431 U.S. 145 4

United States v. *Aleman*, 609 F. 2d 298, cert. denied, 445 U.S. 946 10

United States v. *Boylan*, 620 F. 2d 359, cert. denied, No. 79-1882 (Oct. 6, 1980) 10

United States v. *Dean*, No. 79-1919 (8th Cir. Apr. 17, 1981) 10

United States v. *Dotterweich*, 320 U.S. 277 8

United States v. *Grzywacz*, 603 F. 2d 682, cert. denied, 446 U.S. 935 7

United States v. *Karas*, 624 F. 2d 500, cert. denied, Nos. 80-486, 80-490 (Jan. 12, 1981) 5

PRECEDING PAGE WAS BLANK

Page

Cases—(Continued):

United States v. *Kaye*, 556 F. 2d 855, cert. denied, 434 U.S. 921 ..... 7, 8

United States v. *Morelli*, 643 F. 2d 402, petition for cert. pending, No. 80-1748 (filed Apr. 17, 1981) 10

United States v. *Nerone*, 563 F. 2d 836, cert. denied, 435 U.S. 951 ..... 6, 7

United States v. *Park*, 421 U.S. 658 4

United States v. *Pecora*, 484 F. 2d 1289 8

United States v. *Rone*, 598 F. 2d 564, cert. denied, 445 U.S. 946 10

United States v. *Rubin*, 559 F. 2d 975, vacated and remanded on other grounds, 439 U.S. 810 5

United States v. *Solano*, 605 F. 2d 1141, cert. denied, 444 U.S. 1020 10

United States v. *Swiderski*, 593 F. 2d 1246, cert. denied, 441 U.S. 933 5

United States v. *Webster*, 639 F. 2d 174 6

United States v. *Weisman*, 624 F. 2d 1118, cert. denied, No. 80-62 (Oct. 6, 1981) 5

Page

Constitution, statutes and rules:

United States Constitution, Fifth Amendment (Double Jeopardy Clause) 9, 10

Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922 *et seq.* :

Statement of Findings and Purpose, 84 Stat. 923, 18 U.S.C. 1961 note 4

Section 904(a), 84 Stat. 947, 18 U.S.C. 1961 note 5

Section 904(b), 84 Stat. 947, 18 U.S.C. 1961 note 9

Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1961 *et seq.* :

18 U.S.C. 1961(1)(C) 8
18 U.S.C. 1962(c) 2, 3
18 U.S.C. 1962(d) 2

Taft-Hartley Act, 29 U.S.C. 186 *et seq.*:

29 U.S.C. 186 8
29 U.S.C. 186(a)(1) 7, 8
29 U.S.C. 186(b) 2
29 U.S.C. 186(b)(1) 7, 8
29 U.S.C. 186(d) 8

26 U.S.C. 7201 2

26 U.S.C. 7206(1) 2

Fed. R. Crim. P. :

Rule 8(b) 11

Rule 30 4

Page

Miscellaneous:

116 Cong. Rec. (1970):

p. 18912 6
p. 18939 6

Organized Crime Control: S. 30, and related Proposals Before Subcomm. No. 5 of the House Comm. on the Judiciary, 91st Cong., 2d Sess. (1970) 6

S. Rep. No. 91-617, 91st Cong., 1st Sess. (1969) 5, 9

In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1679

ANTHONY M. SCOTTO, PETITIONER

v.

UNITED STATES OF AMERICA

No. 80-1746

ANTHONY ANASTASIO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-18a)[1] is reported at 641 F. 2d 47.

JURISDICTION

The judgment of the court of appeals was entered on September 2, 1980. Petitions for rehearing were denied on

---

[1]Unless otherwise indicated, "Pet. App." refers to the appendix to the petition in No. 80-1679.

March 6, 1981 (80-1679 Pet. App. 19a; 80-1746 Pet. App. 19a-20a). The petition for a writ of certiorari in No. 80-1679 was filed on April 6, 1981; the petition in No. 80-1746 was filed on April 17, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following an eight-week jury trial in the United States District Court for the Southern District of New York, petitioners were convicted on one count of conspiracy to participate in the affairs of the International Longshoremen's Association (ILA) through a pattern of racketeering activity, in violation of the Racketeer Influenced and Corrupt Organizations Act (RICO) (18 U.S.C. 1962(d)). Petitioner Scotto was also convicted on one substantive count of participating in the affairs of the ILA through a pattern of racketeering activity, in violation of RICO (18 U.S.C. 1962(c)). In addition to the RICO counts, petitioners were convicted on 41 counts charging the demand and receipt of unlawful labor payments, in violation of the Taft-Hartley Act (29 U.S.C. 186(b)), and the failure to report and pay federal income taxes on those payments, in violation of 26 U.S.C. 7201 and 7206(1).[2] Scotto was sentenced to a total of five years' imprisonment, to be followed by five years' probation, and was fined $75,000.[3] Anastasio was sentenced to a total of two years' imprisonment, to be followed by five

---

[2]Thirty-five counts involved the Taft-Hartley violations, of which 24 were against Scotto, eight were against Anastasio, and three were against both petitioners. The remaining six counts charged the tax offenses, of which four pertained to Scotto and two to Anastasio.

[3]Scotto was sentenced to five years' imprisonment and a fine of $25,000 on the substantive RICO count; a suspended sentence, a consecutive term of five years' probation, and a concurrent fine of $25,000 on the RICO conspiracy count; a concurrent term of five years' imprisonment and five years' probation, and a fine of $50,000, on the Taft-Hartley counts; and a concurrent term of three years' imprisonment on the tax counts.

years' probation, and was fined $5,000.[4] The court of appeals affirmed (P . App. 1a-18a).

The evidence at trial, the sufficiency of which is not challenged (Pet. App. 2a), is summarized in the opinion of the court of appeals (*id.* at 4a-5a). In brief, it showed that between 1975 and 1979 Scotto was the president of ILA Local 1814 in Brooklyn and the vice-president for legislative affairs of the national ILA. From 1975 through April 1978, Anastasio was the secretary-treasurer of an affiliated ILA local in Brooklyn, and he later became executive vice-president of ILA Local 1814; in addition, Anastasio was a national organizer for the ILA. In the period 1975-1979, Scotto and Anastasio corruptly used their positions as unions officials to obtain more than 40 illegal labor payoffs exceeding $300,000 from at least six separate waterfront businesses employing ILA labor. These payments were made by the employers to secure petitioners' assistance in such areas as attracting new business, keeping current customers from competitors, and reducing inaccurate worker's compensation claims filed by members of ILA Local 1814.

ARGUMENT

1. Petitioner Scotto contends (Pet. 10-18) that RICO, which prohibits the conduct of the affairs of an enterprise "through" a pattern of racketeering activity (18 U.S.C. 1962(c)), is violated only if the acts of racketeering "advance * * * the enterprise's affairs" (Pet. 15).[5] On this basis he

---

[4]Anastasio was sentenced to two years' imprisonment and a fine of $5,000 on the Taft-Hartley counts; a suspended sentence and five years' probation on the tax counts; and a concurrent term of two years' imprisonment and a concurrent fine of $5,000 on the RICO conspiracy count.

[5]Petitioner's contention is confined to cases involving "legitimate" enterprises (see Pet. 15). Compare *United States* v. *Turkette*, No. 80-808 (argued Apr. 27, 1981).

challenges the adequacy of the district court's instructions to the jury (Pet. i).[6]

We note at the outset that it is doubtful whether this argument was properly preserved in the lower courts.[7] At trial, petitioner did not seek an instruction based on his current theory of RICO, but rather submitted a request framed in terms of the relation between the acts of racketeering and "the operation or management of the enterprise" or "the affairs of the [enterprise] in its essential functions" (Pet. App. 8a-9a n.3). Petitioner pressed the same position in the court of appeals. In these circumstances, we do not believe that the interpretation petitioner now asserts is properly before the Court. See Fed. R. Crim. P. 30; *Henderson* v. *Kibbe*, 431 U.S. 145, 154-156 (1977); *United States* v. *Park*, 421 U.S. 658, 676 (1975).

In any event, petitioner's contention is without merit. Petitioner has cited nothing in the text or history of RICO to support his narrow construction that the enterprise must be the beneficiary rather than the victim of the racketeering activity. To the contrary, for the reasons stated by the court of appeals (Pet. App. 10a-11a), and in light of Congress' broad resolve "to seek the eradication of organized crime in the United States" (Pub. L. No. 91-452, 84 Stat. 923, 18 U.S.C. 1961 note) and its directive that "[t]he provisions of

---

[6]Petitioner does not otherwise challenge the instructions in this regard, which adequately explained the requisite nexus between the acts of racketeering and the enterprise by charging the jury that a verdict of guilty could be returned only if petitioner engaged in a pattern of racketeering activity "while and as part of conducting or participating either directly or indirectly in the conduct of the affairs of the enterprise. * * * [In order to convict, you must] find that the acts were committed by [petitioner] or caused to be committed by him in the conduct of, or his participation in, the affairs of the enterprise" (Pet. App. 9a).

[7]The court of appeals assumed but did not decide that petitioner preserved the issue for review (Pet. App. 8a-9a).

[RICO] shall be liberally construed to effectuate its remedial purposes" (Pub. L. No. 91-452, Section 904(a), 84 Stat. 947, 18 U.S.C. 1961 note), petitioner's argument is unfounded. Moreover, numerous convictions have been obtained and upheld in cases in which the racketeering activity did not advance or facilitate the enterprise. See, *e.g.*, *United States* v. *Karas*, 624 F. 2d 500 (4th Cir. 1980), cert. denied, Nos. 80-486, 80-490 (Jan. 12, 1981) (bribery of local prosecutors); *United States* v. *Weisman*, 624 F. 2d 1118 (2d Cir. 1980), cert. denied, No. 80-62 (Oct. 6, 1980) (skimming of profits and bankruptcy fraud involving theater); *United States* v. *Swiderski*, 593 F. 2d 1246 (D.C. Cir. 1978), cert. denied, 441 U.S. 933 (1979) (restaurant used as a front for a narcotics business); *United States* v. *Rubin*, 559 F. 2d 975, 989-990 (5th Cir. 1977), vacated and remanded on other grounds, 439 U.S. 810 (1978) (embezzlement of union funds).

The legislative history of RICO confirms that the enterprise need not benefit from the acts of racketeering in order to come within the statute. For example, the Senate Report explained that RICO would apply where

> organized crime has moved into legitimate unions. Control of labor supply through control of unions can *prevent the unionization of some industries* or can *guarantee sweetheart contracts in others.* It provides the opportunity for *theft from union funds*, extortion through the threat of economic pressure, and the profit to be gained from the *manipulation of welfare and pension funds and insurance contracts.*

S. Rep. No. 91-617, 91st Cong., 1st Sess. 78 (1969) (emphasis added; footnote omitted). See also *id.* at 77 ("[a]fter takeover, defaulted loans are often liquidated by professional arsonists burning the business and then collecting the insurance or by various bankruptcy fraud techniques"). In illustrating the application of RICO, Senator McClellan,

the principal sponsor of the statute, similarly observed that "[l]abor unions are infiltrated, and then labor peace is sold to businesses. *This does not inure to the benefit of the workingman.* To the contrary, for example, * * * [organized crime] recently required payments from a contractor so that nonunion men could work at lower wages on a project. In business, the mob bleeds a firm of assets, then takes bankruptcy." 116 Cong. Rec. 18912, 18939 (1970). Senator McClellan also noted that RICO would extend to situations where "[b]uilding contractors pay tribute for the privilege of using non-union labor, while labor unions infiltrated by organized crime raise no objection,"or where a "corporation is bled of its assets, goods obtained by the corporation on credit are sold for a quick profit, and then the corporation is forced into bankruptcy while the criminals who infiltrated it disappear." *Organized Crime Control: Hearings S. 30, and related proposals Before Subcomm. No. 5 of the House Comm. on the Judiciary*, 91st Cong., 2d Sess. 95, 106 (1970). This Congressional understanding of the scope of RICO is flatly inconsistent with the reading of the statute urged by petitioner.

Nor do the cases that petitioner cites (Pet. 15-17) demonstrate a conflict among the circuits on this issue. Petitioner relies principally upon *United States* v. *Webster*, 639 F. 2d 174 (4th Cir. 1981). Apart from the factual distinctions between *Webster* and this case, we note that the panel in *Webster* has granted the government's petition for rehearing (App., *infra*, 1a-3a) and has set the case for reargument.[8] Accordingly, petitioner's reliance on *Webster* does not suggest the need for review by this Court at the present time.[9]

---

[8]Reargument is currently scheduled for June 4, 1981.

[9]*United States* v. *Nerone*, 563 F. 2d 836 (7th Cir. 1977), cert. denied, 435 U.S. 951 (1978), also does not establish the existence of a conflict. Indeed, the Seventh Circuit in other decisions, both before and after *Nerone*, has affirmed convictions in which the interests of the enterprise

2. Scotto next contends (Pet. 18-21) that the court of appeals erroneously held he could be convicted of a RICO offense predicated on violations of 29 U.S.C. 186(a)(1) and (b)(1) without regard to *mens rea*. This assertion misconceives the record and opinion below. The district court instructed the jury that it could convict petitioner if it determined that he " 'acted wilfully and knowingly,' " that he " 'knew what he was doing and that he did it deliberately and voluntarily,' " that he acted " 'knowingly and deliberately with a criminal motive or purpose,' " and that he " 'was aware of the general unlawful nature of his act' " (Pet. App. 13a). The court also informed the jury that petitioner could be found guilty on the RICO conspiracy count only if he " 'participated in the conspiracy with a specific and criminal intent, that is, a purpose to violate the law' " (*id.* at 13a-14a). As the court of appeals noted (*id.* at 13a, 14a), any error in those instructions was unduly favorable to petitioner on the *mens rea* element, and his argument that he was convicted of a non-*mens rea* offense is entirely unsupportable.

---

were not furthered by the pattern of racketeering activity. See, *e.g.*, *United States* v. *Grzywacz*, 603 F. 2d 682 (7th Cir. 1979), cert. denied, 446 U.S. 935 (1980) (bribery of police officers); *United States* v. *Kaye*, 556 F. 2d 855 (7th Cir.), cert. denied, 434 U.S. 921 (1977) (Taft-Hartley violations by union official). As the court explained in *Kaye* (556 F. 2d at 861), "defendant was conducting or participating in the affairs of Local 714 when he committed the acts for which he was charged. Defendant as chief steward conducted Local 714's affairs in appointing himself as union steward, and accepting payments as union steward from union contractors for services which were not rendered." Moreover, although the opinion is not entirely free from ambiguity, we read *Nerone* to hold merely that "[t]he government's case must fail because of a total want of proof of the connection between the racketeering activities and the affairs of [a trailer park constituting the enterprise]. Geographical juxtaposition of [the illegal gambling business and the trailer park where the gambling occurred] is insufficient" (563 F. 2d at 852). In view of the tenuous factual connection between the racketeering acts and the enterprise in *Nerone*, we think it plain that the decision in that case and the decision below create no conflict requiring this Court's review.

3. In a similar vein, petitioner Anastasio argues (Pet. 10-11) that violations of 29 U.S.C. 186(a)(1) and (b)(1) cannot serve as predicate acts of racketeering under RICO because they contain no *mens rea* element.[10]

This argument is without merit. 18 U.S.C. 1961(1)(C) unambiguously states without qualification that " 'racketeering activity' means * * * *any* act which is indictable under title 29, United States Code, section 186 * * *" (emphasis added). Anastasio has pointed to nothing in the RICO statute or legislative history to override this plain language.

Furthermore, contrary to the premise of petitioner's contention, 29 U.S.C. 186 is not a strict liability offense. Rather, the defendant must "willfully violate[]" the statute (29 U.S.C. 186(d)). See, *e.g., United States* v. *Kaye, supra*, 556 F. 2d at 863; *United States* v. *Pecora*, 484 F. 2d 1289 (3d Cir. 1973). The requisite intent is therefore the same general intent that is necessary for other predicate acts of racketeering. And, as noted above (see page 7, *supra*), the jury was instructed that petitioners could be convicted of RICO conspiracy based on the Section 186 violations only if they " 'participated in the conspiracy with a specific and criminal intent, that is, a purpose to violate the law.' " Accordingly, Anastasio was not found guilty of the RICO offense under a theory of strict liability without regard to his knowledge or intent. Compare, *e.g., United States* v. *Park, supra*; *United States* v. *Dotterweich*, 320 U.S. 277 (1943).

---

[10]Because Anastasio received concurrent sentences on the Taft-Hartley and RICO counts (see page 3 note 4, *supra*), it is unnecessary to consider his challenge to the RICO count. See, *e.g., Andresen* v. *Maryland*, 427 U.S. 463, 469 n.4 (1976); *Barnes* v. *United States*, 412 U.S. 837, 848 & n.16 (1973).

4. Scotto contends (Pet. 21-24) that a defendant cannot be convicted and cumulatively punished for both a substantive RICO offense and the predicate acts of racketeering. In his view, the racketeering acts are lesser-included offenses within the substantive RICO offense, and thus the imposition of separate penalties is prohibited by the Double Jeopardy Clause.[11]

Petitioner's claim of impermissible cumulative punishments is unavailing on the facts of this case. Because petitioner's sentence on the substantive RICO conviction is concurrent with his aggregate sentence on the other counts (see page 2 note 3, *supra*), it cannot be said in any meaningful sense that the substantive RICO conviction has resulted in a cumulative penalty. Indeed, even if petitioner's argument were accepted, his total sentence would be unchanged. Moreover, the substantive RICO offense requires only two predicate acts of racketeering, and therefore the convictions and sentences on the numerous remaining predicate counts are unaffected by petitioner's argument and suffice to sustain his overall sentence.

At all events, petitioner's double-jeopardy contention was correctly rejected by the court below (Pet. App. 14a). The structure and purpose of the RICO statute clearly evidence Congress' intent to authorize cumulative sentences for the racketeering offenses and for the predicate acts of racketeering. See also Pub. L. No. 91-452, Section 904(b), 84 Stat. 947, 18 U.S.C. 1961 note; S. Rep. No. 91-617, 91st Cong., 1st Sess. 124 (1969). Where cumulative penalties are authorized by statute, the imposition of such penalties in a single sentencing proceeding following a single trial does

---

[11] Petitioner does not, and reasonably could not, urge that the predicate Taft-Hartley violations are lesser-included offenses of the RICO conspiracy offense.

not violate the Double Jeopardy Clause (*Albernaz* v. *United States*, No. 79-1709 (Mar. 9, 1981), slip op. 10-11), and the courts of appeals have consistently sustained consecutive sentences for RICO offenses and the underlying racketeering acts. See *United States* v. *Dean*, No. 79-1919 (8th Cir. Apr. 17, 1981), slip op. 11 n. 14; *United States* v. *Morelli*, 643 F. 2d 402, 413 (6th Cir. 1981), petition for cert. pending, No. 80-1748 (filed Apr. 17, 1981); *United States* v. *Boylan*, 620 F. 2d 359, 361 (2d Cir. 1980), cert. denied, No 79-1882 (Oct. 6, 1980); *United States* v. *Aleman*, 609 F. 2d 298, 306-307 (7th Cir. 1979), cert. denied, 445 U.S. 946 (1980); *United States* v. *Solano*, 605 F. 2d 1141, 1145 (9th Cir. 1979), cert. denied, 444 U.S. 1020 (1980); *United States* v. *Rone*, 598 F. 2d 564, 571-572 (9th Cir. 1979), cert. denied, 445 U.S. 946 (1980).

5. Anastasio argues (Pet. 4-9) that there was misjoinder of the RICO conspiracy and related counts against both petitioners with the substantive RICO and related counts against Scotto alone.[12] First, for the reasons fully explained by the court of appeals (Pet. App. 16a-17a), petitioner at no time "moved to sever the substantive racketeering count and the Taft-Hartley counts against Scotto alone from the other counts charging Scotto and Anastasio together" (*id.* at 17a), and therefore this issue has not been properly preserved for review. Moreover, the challenged counts were part of the same series of transactions by which Scotto and Anastasio misused their union positions for personal gain; indeed, petitioners were jointly charged in certain of the Taft-Hartley counts and in the RICO conspiracy count, which incorporated the joint Taft-Hartley offenses as well as those involving Anastasio alone as " 'some of the means by which [petitioners] committed the offenses charged' "

---

[12]Anastasio does not dispute that he and Scotto were correctly tried together on the counts pertaining to the RICO conspiracy charge.

(80-1746 Pet. App. 20a).[13] Finally, in light of the district court's repeated cautionary instructions to the jury that the evidence concerning the disputed counts was being admitted only against Scotto (Tr. 1225-1226, 2144, 2166, 2199, 3141, 5222, 6060), we do not believe that the inclusion of these counts at trial resulted in prejudice to Anastasio or compromised the ample evidence of his guilt on the counts against him.[14]

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

D. LOWELL JENSEN
Assistant Attorney General

PATTY MERKAMP STEMLER
Attorney

JUNE 1981

---

[13]Of course, as Fed. R. Crim. P. 8(b) expressly provides, "all of the defendants need not be charged in each count."

[14]Contrary to the suggestion of Anastasio (Pet. 7), the misjoinder issue raised in this case is unrelated to the Rule 8 question now before the Court in *United States* v. *Turkette*, No. 80-808 (argued Apr. 27, 1981). Unlike the situation in *Turkette*, where the claim of misjoinder arose only from the invalidation by the court of appeals of the RICO conspiracy count that provided the basis for joinder in the district court, the essential counts against Anastasio have been sustained and are adequate to support a single trial of all counts in the indictment.

APPENDIX

UNITED STATES COURT OF APPEALS FOR
THE FOURTH CIRCUIT

No. 79-5204 (L)

United States of America, Appellee,

versus

Walter R. Webster, etc., Appellant.

No. 79-5240

United States of America, Appellee,

versus

Walter R. Webster, etc., Appellant.

No. 79-5241

United States of America, Appellee,

versus

Richard Adams, etc., Appellant.

No. 79-5242

United States of America, Appellee,

versus

Norma Thompson, Appellant.

No. 79-5243

United States of America, Appellee,

versus

Boysie Ash, Appellant.

No. 79-5244

United States of America, Appellee,

versus

Victoria Wills, Appellant.

No. 79-5245

United States of America, Appellee,

versus

John V. Christian, etc., Appellant.

No. 79-5246

United States of America, Appellee,

versus

Herbert Leon Johnson, etc., Appellant.

ORDER

Upon consideration of the petitions for rehearing with suggestion for rehearing en banc,

IT IS ORDERED that:

1. the suggestion for rehearing en banc is DENIED;

2. the government's motion for rehearing as to the proper interpretation of the RICO statute is GRANTED;

3. all motions for rehearing for other parties are DENIED.

Entered at the direction of Judge Murnaghan with the concurrence of Judge Winter and Judge Butzner.

For the Court

/s/ William K. Slate, II

CLERK

FILED
MAY 4, 1981
WILLIAM K. SLATE, II
CLERK

No. 80-1679

JUN 5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

ANTHONY M. SCOTTO, *Petitioner*,

v.

UNITED STATES OF AMERICA

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

---

PETITIONER'S REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION

EDWARD BENNETT WILLIAMS
HAROLD UNGAR
RICHARD M. COOPER
WILLIAMS & CONNOLLY
839 17th Street, N.W.
Washington, D.C. 20006
(202) 331-5000

Counsel for Petitioner Anthony M. Scotto

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

TABLE OF CONTENTS

	PAGE
THE GOVERNMENT'S POINT 1	2
THE GOVERNMENT'S POINT 4	4
CONCLUSION	5

TABLE OF AUTHORITIES

CASES:	PAGE
Henderson v. *Kibbe*, 431 U.S. 145, 155 (1977)	2
United States v. *Gibson*, 486 F. Supp. 1230, 1244 (S.D. Ohio 1980)	3
United States v. *Nerone*, 563 F.2d 836, 851 (1977), *cert. denied*, 435 U.S. 951 (1978)	3
United States v. *Webster*, 639 F.2d 174 (4th Cir. 1981)	3, 4
Whelan v. *United States*, 445 U.S. 684, 692 (1980)	4
STATUTES AND RULES:	
Section 904(b), Organized Crime Control Act, Pub. L. No. 91-452, 84 Stat. 947, 18 U.S.C. 1961 note	4, 5
Fed. R. Crim. P. 30	2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1679

ANTHONY M. SCOTTO, *Petitioner,*

v.

UNITED STATES OF AMERICA

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

---

PETITIONER'S REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION

The government opposes this petition in the numbered points 1, 2 and 4[1] of its Brief in Opposition (hereinafter "Brief") at 3, 7 and 9. The government's point 2 seems to us to merit no reply. We confine ourselves, therefore, to the government's points 1 and 4.

---

[1] Points 3 and 5 deal with the petition in No. 80-1746.

The Government's Point 1

The government attributes to petitioner a position he does not take: "that RICO . . . is violated only if the acts of racketeering 'advance . . . the enterprise's affairs'," and "that the enterprise must be the beneficiary rather than the victim of the racketeering activity." Brief at 3, 4. The next three pages (4-6) of the government's brief are devoted to an attack on that straw man.[2]

Petitioner's position in both courts below and in this Court has been and is that "there must be an operational, functional nexus between the predicate acts and his participation in the conduct of the affairs of the union" and "that, to be convicted under RICO, 'you have to intend to conduct the enterprise directly or indirectly in an illegal manner'." Petition at 5.

The beneficiary-victim question is raised in the petition only as an illustration of the "rapidly proliferating

---

[2] The government's threshold invocation of Fed. R. Crim. P. 30 as an impediment to a grant of certiorari because "petitioner did not seek an instruction based on his current theory of RICO" (Brief, p. 4), must, of course, fail because petitioner has no "current theory of RICO" different from the ones on which the government admits he based his requested jury instructions.

Equally invalid is the government's contention (Brief at 4 n.6) that the instruction actually given was adequate. In *Henderson* v. *Kibbe*, 431 U.S. 145, 155 (1977), cited by the government, the Court, in upholding the sufficiency of an instruction in the language of a statute which gave the jury no specific criteria for determining causation, noted that it did so "[b]ecause the respondent did not submit a draft instruction on the causation issue to the trial judge . . . ." Here, as the government concedes (Brief at 4), petitioner requested, and was denied, an instruction on "the relation between the acts of racketeering and 'the operation or management of the enterprise'."

questions concerning the nature and degree of the required relation" between the acts and the enterprise. Without suggesting that RICO requires the enterprise to be advanced rather than victimized, the petition in one short paragraph at p. 15, points to the undeniable conflict in that regard between the decision below and the newly announced decision in *United States* v. *Webster*, 639 F.2d 174 (4th Cir. 1981). The petition then goes on, however, to argue that both *Webster* and *United States* v. *Nerone*, 563 F.2d 836, 851 (1977), *cert. denied*, 435 U.S. 951 (1978), as well as a district court decision in *United States* v. *Gibson*, 486 F. Supp. 1230, 1244 (S.D. Ohio 1980), were clearly in conflict with the court below in the instant case and with the official Department of Justice position, as stated in the United States Attorneys' Manual, in holding, as to the required acts-enterprise nexus, that *the acts must influence the enterprise*, not the other way around. Petition, pp. 16-17. That conflict is not addressed in the government's brief.[3]

---

[3] When the instant petition was filed, a petition for rehearing was pending in the *Webster* case. The government now points out (Brief at 6 and Appendix) that rehearing has since been granted in *Webster*. What the government does not disclose is that its petition for rehearing in that case dealt with the court's construction of RICO as requiring *benefit to or advancement of* the affairs of the enterprise by the racketeering activities, a construction unnecessary to the position of petitioner in this case. Petitioner's position here is that he was entitled to an instruction that "you have to conduct the enterprise directly or indirectly in an unlawful manner" and that the trial judge clearly and flatly refused to give such an instruction. Petition at 5. We think the position taken by the government in *Webster* supports our position here, for, as the government there said:

> ". . . A careful reading of the legislative history of the RICO statute indicates that what Congress was attempting to proscribe was the infiltration and corruption of legitimate enterprises by or through racketeering activity. In the end then, the

The Government's Point 4

As to petitioner's argument that it was error to convict and cumulatively punish him not only for the RICO violation, but also for the predicate Taft-Hartley violations, the government begins with the grossly erroneous assertion that this argument is "unavailing on the facts of this case," because "even if petitioner's argument were accepted, his total sentence would be unchanged." Brief at 9.

The government itself points out (Brief at 2 n.3) that, although Scotto received concurrent prison sentences, he was fined $50,000 on the Taft-Hartley counts *cumulatively* to the RICO fine of $25,000. See also, Petition at 3 and 9. A merger of the Taft-Hartley convictions into the RICO convictions would thus make a $50,000 difference in the total sentence.

On the merits of the question petitioner has argued here (Petition at 22) that cumulative punishments are impermissible, as this Court said in *Whalen* v. *United States*, 445 U.S. 684, 692 (1980), "in the absence of a clear indication of contrary legislative intent," and that the court below cited no such clear indication. The government now purports to supply that deficiency by citing § 904(b) of the Organized Crime Control Act, Pub. L. No. 91-452, 84 Stat. 947, 18 U.S.C. 1961 note. That provision, however, is simply irrelevant. It merely prevents repeals of other criminal statutes by implication. We do not contend that RICO repealed the statutes

---

best measure of whether a legitimate business has been conducted 'through' a pattern of racketeering activity may be the functional test of whether it has in some sense been corrupted by that activity. This is what we believe the 'substantial nexus' standard really means." *United States* v. *Webster*, *supra*, Appellees' Petition for Rehearing, p. 6.

creating the predicate offenses. We merely contend that where the jury finds the accused guilty of both RICO and lesser included offenses, separate convictions and sentences cannot be imposed. Nothing in § 904(b) is to the contrary.

CONCLUSION

In light of the foregoing and for the reasons stated in the Petition, it is respectfully prayed that the writ of certiorari be granted.

Respectfully submitted,

EDWARD BENNETT WILLIAMS
HAROLD UNGAR
RICHARD M. COOPER
WILLIAMS & CONNOLLY
839 17th Street, N.W.
Washington, D.C. 20006
(202) 331-5000

Counsel for Petitioner
Anthony M. Scotto

see 80

9 7 4 6